(13)

No. 94-3-CSX
Status: GRANTED

Title: Reynoldsville Casket Co., et al., Petitioners
v.
Carol L. Hyde

Docketed:
June 30, 1994

Court: Supreme Court of Ohio

Counsel for petitioner: Riedel,William E.

Counsel for respondent: Eardley,David J.

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1994	G	Petition for writ of certiorari filed.
2	Jul 28 1994		Brief of respondent Carol L. Hyde in opposition filed.
3	Aug 3 1994		DISTRIBUTED. September 26, 1994 (Page 82)
4	Aug 3 1994	G	Motion of Dalkon Shield Claimants Trust for leave to file a brief as amicus curiae filed.
5	Aug 25 1994		Opposition of respondent to motion of Dalkon Shield Claimants Trust for leave to file a brief as amicus curiae filed.
6	Sep 19 1994	X	Brief of Dalkon Shield Claimants Trust in reply to respondent's opposition to motion for leave to file brief amicus curiae filed.
7	Oct 3 1994		Motion of Dalkon Shield Claimants Trust for leave to file a brief as amicus curiae GRANTED.
9	Oct 3 1994		REDISTRIBUTED. October 7, 1994 (Page 27)
10	Oct 7 1994		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, November 16, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 13, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 29, 1994. Rule 29.2 does not apply.
			**********
11	Nov 7 1994		Record filed.
		*	Partial record proceedings Supreme Court of Ohio.
12	Nov 7 1994		Record filed.
		*	Original record proceedings Court of Appeals of Ashtabula County, Ohio.
15	Nov 15 1994	G	Motion of Dalkon Shield Claimants Trust for leave to file a brief as amicus curiae filed.
13	Nov 16 1994		Joint appendix filed.
14	Nov 16 1994		Brief of petitioners Reynoldsville Casket Co., et al. filed.
16	Nov 28 1994		Motion of Dalkon Shield Claimants Trust for leave to file a brief as amicus curiae GRANTED.
17	Dec 13 1994	X	Brief of respondent Carol L. Hyde filed.
18	Dec 13 1994	X	Brief amicus curiae of Ohio filed.
19	Dec 13 1994	G	Motion of Brown & Szaller Co., et al. for leave to file a brief as amici curiae filed.
20	Dec 21 1994		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1995. (2ND CASE).
21	Dec 23 1994		CIRCULATED.
22	Dec 29 1994	X	Reply brief of petitioners filed.
23	Jan 9 1995		Motion of Brown & Szaller Co., et al. for leave to file

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No. 94-3-CSX

Entry	Date	Note	Proceedings and Orders
24	Feb 27 1995		a brief as amici curiae GRANTED. ARGUED.

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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74 pp

QUESTION PRESENTED FOR REVIEW

Whether state courts, in refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), to civil cases pending at the time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was announced may properly premise their actions on the following grounds:

A. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), dictates that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should not be retroactively applied.

B. *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), allows state courts to tailor their own remedies as they determine the manner in which a United States Supreme Court opinion is to be retroactively applied.

C. When there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

William E. Riedel, Attorney for Reynoldsville Casket Co. and John M. Blosh, petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court, entered on February 9, 1994.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 68 Ohio St. 3d 240 (1994) and is attached at Appendix p. A1.

The opinion of the Eleventh District Court of Appeals for Ashtabula County, Ohio, was entered on July 2, 1992 and is attached hereto at Appendix p. A17.

The judgment entry of the trial court was entered on July 31, 1991 and is attached hereto at Appendix p. A27.

JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was entered on February 9, 1994. Petitioners' request for a rehearing was denied by the Ohio Supreme Court on April 6, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Article VI, cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Appendix p. A36.

Ohio Const., Article I, §16, provides in part that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Appendix p. A36.

Ohio Revised Code §2305.10, provides in part that:

> "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

Appendix p. A37.

Ohio Revised Code §2305.15, provides in part that:

> "When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Appendix p. A38.

Ohio Revised Code §2305.15(a), provides in part that:

> "(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Appendix p. A39.

STATEMENT OF THE CASE

On March 5, 1984, John M. Blosh, while driving a truck owned by his employer, the Reynoldsville Casket Co., was involved in an auto accident with another vehicle in which Carol L. Hyde was a passenger. The accident occurred in Ashtabula County, Ohio. The Reynoldsville Casket Co., a Pennsylvania corporation, had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio. John M. Blosh and Carol L. Hyde were also residents of Pennsylvania.

On August 11, 1987, Carol L. Hyde filed suit against John M. Blosh and the Reynoldsville Casket Co. claiming that John M. Blosh, while in the scope of his employment with Reynoldsville Casket Co., was negligent in the operation of Reynoldsville Casket Co.'s truck, said negligence causing bodily injury to Carol L. Hyde. On October 13, 1987, John M. Blosh and the Reynoldsville Casket Co. filed their Answer. Along with denying the allegation of negligence, John M. Blosh and the Reynoldsville Casket Co. raised the affirmative defense that Carol L. Hyde's claim was time barred by Ohio's two-year statute of limitations, O.R.C. §2305.10.

On February 8, 1988, John M. Blosh and Reynoldsville Casket Co. filed a Motion to Dismiss, pursuant to Oh. Civ. R. 12(B)(6), requesting dismissal of Carol L. Hyde's Complaint in that it was time barred by the two-year statute of limitations contained in O.R.C. §2305.10. Carol L. Hyde's response to the Motion to Dismiss was to claim that O.R.C. §2305.15, generally referred to as the Savings Clause, permitted the filing of her Complaint.

While the Motion to Dismiss was pending before the trial court, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), declared that Ohio's Savings Clause, O.R.C. §2305.15 violated the Commerce Clause of the United States Constitution since it imposed an impermissible burden on interstate commerce. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court declined to address the argument of Bendix that if the Court found O.R.C. §2305.15 unconstitutional, the Court's ruling should be prospective only and not apply to the parties in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

On July 31, 1991, the trial court granted John M. Blosh's and Reynoldsville Casket Co.'s Motion to Dismiss. In dismissing the Complaint of Carol L. Hyde, the trial court applied the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to both Reynoldsville Casket Co. and John Blosh. Upon appeal to the Court of Appeals, the decision of the trial court was affirmed in all respects. As to the issue of prospective application, the Court of Appeals stated:

> "The general rule in Ohio is:
>
> "' *** (A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. ***' *State, ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90 quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210."

On appeal to the Ohio Supreme Court, in a five-two decision, the judgment of the Court of Appeals was reversed and the case remanded to the trial court for further proceedings. In reversing, the Ohio Supreme Court held that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed.2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

68 Ohio St. 3d at 240.

In support of its decision, the majority advanced two positions. First, the majority stated that:

> "If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case."

68 Ohio St. 3d at 243.

Second, the majority declared that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

68 Ohio St. 3d at 244.

As to the perceived scope of *Harper v. Virginia Dept. of Taxation*, the majority stated:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

68 Ohio St. 3d at 244.

and

> "... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245.

With regard to the reference to remedy found in *Harper v. Virginia Dept. of Taxation*, the remedy adopted by the majority was to simply ignore *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* As stated by the majority:

> "The Ohio constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix*, we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:
>
> 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

68 Ohio St. 3d at 244.

Two justices dissented. In identifying the correct issue for review, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterpries, Inc.* applies retroactively to bar Carol L. Hyde's personal injury claim, the dissenters noted the following:

"The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296. But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S. Ct. 2510, 125 L.Ed.2d 74."

68 Ohio St. 3d at 246.

"What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S. Ct. at 2330, 110 L.Ed.2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of decision—*is a matter of federal law.*" (Emphasis added).

68 Ohio St. 3d at 247.

"The Ohio constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

68 Ohio St. 3d at 249.

"The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is binding on the states under the

Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent."

68 Ohio St. 3d at 249-250.

A Motion for Rehearing filed on February 18, 1994 was denied by the Ohio Supreme Court on April 6, 1994.

REASONS FOR ALLOWANCE OF WRIT

In refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), to the untimely filing of Carol L. Hyde's Complaint, the majority of the Ohio Supreme Court has brought into play two critical propositions of law that have long been the subject of conflicting judicial inquiry and legal commentary. First, does *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), have any legal applicability in light of the recent decisions reached in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Second, when the United States Supreme Court in the interpretation of federal law declares a state statute unconstitutional, what, if any, freedoms do the states have to limit, restrict or ignore the retroactive application of the United States Supreme Court's holding regarding unconstitutionality.

The holding of the Ohio Supreme Court was that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, (1988), 486 U.S. 888, 108 S. Ct. 2218 100 L. Ed. 2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

68 Ohio St. 3d at 240.

In refusing to retroactively apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority relied upon a *Chevron Oil Co. v. Huson* analysis of the underlying case facts. In *James B. Beam Distilling Co. v. Georgia*, six justices agreed with the result that if a new

federal constitutional rule is applied to the litigants in the case in which the rule is announced, the rule applies retroactively to cases that are not barred by procedural requirements or res judicata. In *James B. Beam Distilling Co. v. Georgia*, Justice Souter stated:

> "To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case."

115 L. Ed. 2d 493.

As further support for its holding, the majority also opined that *Harper v. Virginia Dept. of Taxation* allowed the state courts to tailor their own remedies as they detemine the manner in which a United States Supreme Court opinion is to be applied retroactively. The Ohio Supreme Court further stated that:

> "... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245.

Neither statement of the Ohio Supreme Court is supported by the decisional law of this Court or the U.S. Constitution. The instant case presents this Court with an appropriate setting to address the present day viability of *Chevron Oil Co. v. Huson* as well as to provide other courts with guidance and direction when confronted with the issue of retroactivity announced in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.*

I. The Continued Reliance Of The Ohio Supreme Court In Deciding Issues Of Retroactivity Based Upon A *Chevron Oil Co. v. Huson* Analysis Is Erroneous In Light Of The Clear Directives Regarding *Chevron Oil Co. v. Huson* And Retroactivity That Are Set Forth In *James B. Beam Distilling Co. v. Georgia* And *Harper v. Virginia Dept. Of Taxation.*

In support of its decision, the majority stated:

> "If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

68 Ohio St. 3d at 243.

If there was any question that *Chevron Oil Co. v. Huson* was not controlling after *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), then any such doubt was put to rest when the United States Supreme Court decided *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

Although *James B. Beam Distilling Co. v. Georgia* did not produce a unified opinion, the majority of the Justices agreed that:

> "... when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."

115 L. Ed. 2d at 493.

The Court's holding in *James B. Beam Distilling Co. v. Georgia* promoted equality by limiting the possibility for disparate treatment of similarly situated litigants. As stated by Justice Souter:

> "Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis."

115 L. Ed. 2d at 491.

In his concurring opinion in *James B. Beam Distilling Co. v. Georgia*, with whom Justice Marshall and Justice Blackmun concurred, Justice Scalia, in urging a complete abrogation of any *Chevron Oil Co. v. Huson* inquiry, stated:

> "If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of '[t]he Executive power' may be familiar to other legal systems, but is alien to our own. So also, I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as *judges make it*, which is to say as *though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses 'difficulties of a ... practical sort,' ante, at—, 115 L. Ed. 2d, at 488, when courts decide

to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

"For this reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power."

115 L. Ed. 2d at 497.

Justice Blackmun, in commenting upon the concept of prospective application of new decisional rules stated:

"We fulfill our judicial responsibility by requiring retroactive application of each new rule we anounce . . . Like Justice Scalia, I conclude that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function."

115 L. Ed. 2d at 496.

Since the ruling in *James B. Beam Distilling Co. v. Georgia*, other courts have applied retroactivity without consideration of a *Chevron Oil Co. v. Huson* analysis. The North Dakota Supreme Court in *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (1992), had an opportunity to decide a case involving essentially the same issues that are present in the instant case, *i.e.*, a savings statute, a late filing of a Complaint, a request to apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and a potential *Chevron Oil Co. v. Huson* analysis. In declining to resolve the issues on the basis of a *Chevron Oil Co. v. Huson* analysis, the North Dakota Supreme Court stated:

". . . the *Chevron* factors have been limited by the United States Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). In *Beam* the Court considered the issue of retroactive or prospective application of its prior decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984). In *Bacchus*, the Court held that Hawaii's discriminatory tax on alcohol violated the Commerce Clause. In *Beam* the Court considered Georgia's similar discriminatory tax on alcohol. Although there was no majority opinion in *Beam*, six justices ultimately concluded that the Court's decision in *Bacchus* about the Hawaii taxes applied retroactively to *Beam* and the Georgia taxes.

* * *

"Thus, in *Beam* six justices agreed with the result that if a new federal constitutional rule is applied to the litigants in the case in which the rule is announced, the rule applies retroactively to cases that are not barred by procedural requirements or res judicata. * * *

"In *Bendix* the Court held that Ohio's tolling statute violated the federal constitution. The Court rejected the plaintiff's request for prospective application because that argument was not raised in the lower courts. The *Bendix* court thus applied its decision to the parties in that case and affirmed the dismissal of the plaintiff's lawsuit on the ground that it was barred by the statute of limitations. Although we have only now, in this opinion, declared Section 28-01-32, N.D.C.C., unconstitutional, under *Beam* the choice of law issue is governed by the federal rule announced in *Bendix*[1]

[1] "*Beam* was limited to decisions changing federal law. Under *Sunburst*, state courts are not precluded from using the *Chevron* facts in decisions changing state law such as *First Interstate Bank of Fargo v. Larson*, 475 N.W. 2d 538 (N.D. 1991). *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) [Retroactive application of state judicial decision announcing a new rule of tort law governed by *Chevron* analysis]." *Bendix* was, however, concerned with a new federal constitutional rule.

and that decision applies retroactively to the Muller's action."

487 N.W.2d at 4-5.

The *Muller* court went on to state:

"We conclude that under *Beam*, the Supreme Court's decision in *Bendix* and our decision in this case apply retroactively to the lawsuit. Accordingly, we affirm the summary judgment dismissing the Muller's action."

487 N.W.2d at 6.

Noteworthy was the *Muller* court footnote that:

"Because of our resolution of this case, we need not analyze this case under the *Chevron* factors."

487 N.W.2d at 6.

Likewise, in *Bottineau Farmers Elevator v. Woodward-Clyde*, 963 F.2d 1064 (8th Cir. 1992), the Court stated:

"We do not think our commerce clause ruling should be applied only prospectively and not to the parties in this case. In the present case, retroactive applicability is a federal question because the ruling itself is derived from federal constitutional law. *See American Trucking Assns. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990) (plurality opinion). Retroactive application of the ruling to the parties before the court is consistent with the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, _____ U.S. _____, 111 S. Ct. 2439, 2445-46, 115 L. Ed. 2d 481 (1991), in which the Court announced that full retroactivity is the normal rule in civil cases and limited the applicability of the *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), test for prospectivity."

963 F.2d at 1074, 1075.

See also Boudrea v. Deloitte, Haskins & Sells, 942 F.2d 497 (8th Cir. 1991) (*per curiam*); *Welch v. Cadre Capital*, 946 F.2d 185 (Welch II) (2d Cir. 1991), *on remand from*, 111 S. Ct. 2882 (1991).

In discussing *Chevron Oil Co. v. Huson* and its applicability to *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and O.R.C. §2305.15, the Ohio Supreme Court stated:

"The facts in the present case pass the three-pronged *Chevron* test for nonretroactivity. The United States Supreme Court's opinion in *Bendix, supra*, was the first time that any court of binding authority in Ohio's state courts had ruled R.C. 2305.15 unconstitutional. When Hyde was injured, she could not have foreseen that R.C. 2305.15 would be struck down four years later. 'the most [s]he could do was to rely on the law as it then was.' *Chevron*, 404 U.S. at 107, 92 S. Ct. 356, 30 L. Ed. 2d at 306."

68 Ohio St. 3d at 243.

The Ohio Supreme Court's reliance upon *Chevron Oil Co. v. Huson* is misplaced in light of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*. As stated by Justice Thomas in *Harper v. Virginia Dept. of Taxation*:

"We need not debate whether Chevron Oil represents a true 'choice-of-law principle' or merely 'a remedial principle for the exercise of equitable discretion by federal courts.' *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 220, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990) (Stevens, J., dissenting). Compare id., at 191-197, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (plurality opinion) (treating *Chevron Oil* as a choice-of-law rule), with id., at 218-224, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is

> characterized, our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one."

125 L. Ed. 2d at Fn. 9, pg. 85.

By virtue of the clear directives set forth in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*, the logic and reasoning of the Ohio Supreme Court in continuing to rely upon *Chevron Oil Co. v. Huson* is erroneous.

The lukewarm reliance by the majority in relying upon *Chevron Oil Co. v. Huson* to support its holding is noted not only from the dissent but the majority as well. With regard to the latter, the majority stated:

> "Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision."

68 Ohio St. 3d at at 246.

In commenting upon the *Chevron Oil Co. v. Huson* test, the dissent stated:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

68 Ohio St. 3d at Fn. 2, pg. 246.

II. The Ohio Supreme Court Ruling Regarding Its Refusal To Retroactively Apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Is Violative Of The Supremacy Clause Of The United States Constitution Which Prohibits The Federal Retroactivity Doctrine To Be Supplanted By The Invocation Of A Contrary Approach To Retroactivity Under State Law.

In *Harper v. Virginia Dept. of Taxation*, the Court held that *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), applied retroactively to invalidate all state taxation schemes similar to Michigan's. *Harper v. Virginia Dept. of Taxation* also prescribed a general rule that required the Court's decisions to be applied retroactively.

The rule of law announced in *Harper v. Virginia Dept. of Taxation* is clear and to the point. As stated by Justice Thomas:

> "*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: *When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.* This rule extends *Griffith's* ban against 'selective application of new rules.' 479 U.S., at 323, 93 L. Ed. 2d 649, 107 S. Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L. Ed. 2d 649, 107 S. Ct. 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to

> 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting)." (Emphasis supplied).

125 L. Ed. 2d at 86.

Just as *Griffith v. Kentucky,* 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), eliminated limits on retroactivity in the criminal context by overruling *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 601 (1965), *Harper v. Virginia Dept. of Taxation* has achieved the same result in the civil arena. Today, as a result of *Harper v. Virginia Dept. of Taxation,* there should be no impediments standing in the way that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all Courts adjudicating federal law. The majority in the instant case has chosen to ignore the rule set forth in *Harper v. Virginia Dept. of Taxation* thus creating an impediment to the application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in Ohio.

In seeking to circumvent the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* the majority has chosen to ignore the Supremacy Clause of the U.S. Constitution. As stated by Justice Thomas:

> "The Supremacy Clause, U.S. Const., Art. VI, cl 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive

> operation of their own interpretations of state law, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-366, 77 L. Ed. 360, 53 S. Ct. 145, 85 ALR 254 (1932), cannot extend to their interpretations of federal law. See *National Mines Corp. v. Caryl,* 497 U.S. 922, 923, 111 L. Ed. 2d 740, 110 S. Ct. 3205 (1990) (per curiam); *Ashland Oil, Inc. v. Caryl,* 497 U.S. 916, 917, 111 L. Ed. 2d 734, 110 S. Ct. 3202 (1990) (per curiam)."

125 L. Ed. 2d at pg. 88.

The decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided on the basis of a violation of the Commerce Clause to the U.S. Constitution, clearly an issue involving federal law. In seeking to circumvent the rule announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* the majority has sought to except itself from the directives of *Harper v. Virginia Dept. of Taxation* by stating:

> "The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, 'retains flexibility' in fashioning appropriate relief."

68 Ohio St. 3d at 244.

The relief fashioned by the majority is not the tax remedy referred to in *Harper v. Virginia Dept. of Taxation.* To the contrary, it is the wrongful validation of an unconstitutional statute. As noted by the Court in *Harper v. Virginia Dept. of Taxation*:

> "The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law 'provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.'

> *McKesson*, 496 U.S., at 36-37, 110 L. Ed. 2d 17, 110 S. Ct. 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.*, at 51-52, 110 L. Ed. 2d 17, 110 S. Ct. 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n. 36, 110 L. Ed. 2d 17, 110 S. Ct. 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L. Ed. 2d 17, 110 S. Ct. 2238."

125 L. Ed. 2d at 89.

The facts underlying the instant case are far different from the tax issue presented in *Harper v. Virginia Dept. of Taxation.* Whereas *Harper v. Virginia Dept. of Taxation* was a fully adjudicated case, the instant case has not proceeded beyond the pleading stage. No trial has been held regarding a finding of liability. As noted by the dissent:

> "No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case.

68 Ohio St. 3d at 247.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided on the basis of the Commerce Clause to the United States Constitution that Ohio had no authority to toll its statute of limitations against out-of-state entities. Quite simply, O.R.C. §2305.15 is unconstitutional.

Despite the clear pronouncement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and the rule set forth in *Harper v. Virginia Dept. of Taxation,* the majority has attempted to erect a "... selective temporal barrier ..." (*Harper v. Virginia Dept. of Taxation,* 125 L. Ed. 2d at pg. 86) to the application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to civil cases pending in Ohio. Such conduct is violative of the admonition of Justice Thomas in *Harper v. Virginia Dept. of Taxation* when he stated:

> "Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L. Ed. 2d 649, 107 S. Ct. 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting)."

125 L. Ed. 2d at 86.

The rationale for the erection of a barrier to the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was stated by the majority as follows:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

68 Ohio St. 3d at 244.

No case support was cited by the majority for its sweeping assertion. Likewise, the majority failed to support its statements that:

> "We find that when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the constitution, such as retroactivity; the state civil right prevails."

68 Ohio St. 3d at 245.

> "This conflict between the federal rule of retroactivity and Ohio's right to a remedy must be resolved in favor of the state constitutional civil right."

68 Ohio St. 3d at 245.

The state constitutional civil right that the majority so jealously seeks to protect is the state equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution, a right guaranteed to all citizens of the United States by the United States Constitution. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422 (1994).

In commenting upon the majority's inability to support its decision with case precedent, the dissent stated:

> "What is absent from the majority's decision is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this

> point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S. Ct. at 2330, 110 L. ED. 2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—*is a matter of federal law.*' (Emphasis added.) Quoting this language, the court in *Ashland Oil, Inc. v. Caryl* (1990), 497 U.S. 916, 918, 110 S. Ct. 3202, 3204, 111 L. Ed. 2d 734, 737, refused to apply the West Virginia Supreme Court's state-law criteria for retroactivity, stating instead that the court must examine whether to give retroactive effect to a constitutionally based decision 'in light of *our* nonretroactivity doctrine.' (Emphasis added.)
>
> "Finally, the Virginia Supreme Court in *Harper* had attempted to deny retrospective effect to the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891, by resting its judgment on 'independent and adequate' state grounds. The United States Supreme Court rebuffed the Virginia court's effort at avoiding the application of federal rules of retroactivity by stating:
>
> > 'The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law * * * cannot extend to their interpretations of federal law.' *Id.*, 509 U.S. at _____, 113 S. Ct. at 2519, 125 L. Ed. 2d at 88."

68 Ohio St. 3d at 247-248.

Despite O.R.C. §2305.15 having been declared unconstitutional, the majority has chosen to disregard *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and

applied its own interpretation of federal law to the question of retroactivity. In a word, the majority has transformed an unconstitutional statute into a statute that has the full force and effect of constitutionality by resort to what Justice Thomas decried, that being the erection of selective temporal barriers to the application of federal law in civil cases.

The Supremacy Clause to the United States Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *Harper v. Virginia Dept. of Taxation* requires that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,

The rules of law established by the majority, *i.e.*, the rights of the states to tailor their own remedies regarding retroactivity and the assertion that a state civil right supplants the strict federal rule of retroactivity announced in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* are not supported by statute or case law. As noted by the dissent:

> "The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

68 Ohio St. 3d at 249.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 9, 1994)

Case No. 92-1682

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

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[240] [Cite as *Hyde v. Reynoldsville Casket Co.* (1994), 68 Ohio St.3d 240.]

Statutes of limitations—Recent United States Supreme Court decision may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision—Section 16, Article I, Ohio Constitution, applied.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. (1988), 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896, may not be retroactively applied to bar claims in [241] state courts which had accrued prior to the announcement of that decision. (Section 16, Article I, Ohio Constitution, applied.)

See: West's Ohio Digest, Courts 100(1).

(No. 92-1682—Submitted September 28, 1993—Decided February 9, 1994.)

APPEAL from the Court of Appeals for Ashtabula County, No. 91-A-1660.

On March 5, 1984, appellant Carol L. Hyde was injured in a traffic accident in Ashtabula County, Ohio, allegedly caused by the negligence of John M. Blosh while he was operating a vehicle owned by the Reynoldsville Casket Company ("RCC").

It is not disputed that RCC is a Pennsylvania corporation which is not licensed to do business in Ohio and has not appointed an agent to receive service of process in the state.

On August 11, 1987, Hyde filed a complaint in the Court of Common Pleas of Ashtabula County. The complaint alleged that Blosh had negligently caused Hyde's injuries and contended that because "Blosh's actions were in the scope and course of his employment with the [Reynoldsville] Casket Co.," RCC was also liable for those injuries.

On February 8, 1988, RCC and Blosh then filed a motion to dismiss, claiming that the complaint was barred by Ohio's statute of limitations. The trial court granted the motion, and the court of appeals affirmed the trial court's decision.

This cause is now before this court pursuant to the allowance of a motion to certify the record, 65 Ohio ST.3d 1456, 602 N.E.2d 252.

David J. Eardley, for appellant.

William E. Riedel, for appellees.

Williams, Jilek, Lafferty & Gallagher Co., L.P.A., and *Dale M. Grocki,* urging reversal for *amicus curiae,* Ohio Academy of Trial Lawyers.

Brown & Szaller Co., L.P.A., and *James F. Szaller,* urging reversal for *amicus curiae,* Brown & Szaller Co., L.P.A.

Spangenberg, Shibley, Traci, Lancione & Liber, Robert A. Marcis and *Cathleen M. Bolek,* urging reversal for *amicus curiae,* Spangenberg, Shibley, Traci, Lancione & Liber.

Arter & Hadden, Irene C. Keyse-Walker and *Robert C. Tucker,* urging affirmance for *amicus curiae,* Dalkon Shield Claimants Trust.[1]

[241] PFEIFER, *J.* This court is asked to determine whether the United States Supreme Court decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S.Ct. 2218, 109 L.Ed.2d 896, holding the Ohio tolling statute, R.C. 2305.15(A), to be unconstitutional, should be retroactively applied to Hyde's complaint filed against RCC and Blosh. For the following reasons, we determine that *Bendix* may not be retroactively applied.

Unless Hyde may utilize the tolling provision in R.C. 2305.15(A), her claim is precluded by the applicable statute of limitations. In Ohio, the period of limitations for a personal injury negligence action is two years. R.C. 2305.10. Hyde filed her complaint seventeen months after this two-year period had expired. At the time of the accident, R.C. 2305.15, now 2305.15(A), tolled the limitations period for claims against out-of-state defendants by providing:

> "When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the

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[1] The motion of the Dalkon Shield Claimants Trust for leave to file a brief *amicus curiae* is hereby granted.

> commencement of the action as provided in sections 2305.04 to 2305.14 * * * of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence of concealment shall not be computed as any part of a period within which the action must be brought." 129 Ohio Laws 177.

It is not alleged that RCC re-entered the state of Ohio after the accident of March 5, 1984. Pursuant to R.C. 2305.15, the limitations period for Hyde to bring an action against RCC was tolled, and had not elapsed when Hyde filed her complaint. See *Seeley v. Expert, Inc.* (1971), 26 Ohio St.2d 61, 55 O.O.2d 120, 269 N.E.2d 121.

Nearly one year after Hyde filed her complaint, the United States Supreme Court determined that the tolling provision in R.C. 2305.15 violated the Commerce Clause of the United States Constitution when applied to out-of-state entities. *Bendix, supra.* In its opinion, the *Bendix* court specifically declined to determine whether its ruling should be applied prospectively only. *Id.*, 486 U.S. at 806, 108 S.Ct. at 2222-2223, 100 L.Ed.2d at 905.

We are now confronted with the task of determining whether the *Bendix* decision is to be applied retroactively. Until recently, *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, provided the three-part test to determine whether courts should retroactively apply a decision of the United States Supreme Court when the result is to shorten limitations periods of cases accrued before the decision was announced. However, in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125

L.Ed.2d 74, the United States Supreme Court announced a new test concerning the retroactive [243] application of decisions. It is unclear whether *Harper* was intended to replace *Chevron*, or to supplement it.

I

If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case. The present case is closer to *Chevron* than to *Harper*. *Harper* determined that a United States Supreme Court decision striking down a Michigan taxing practice as unconstitutional must be retroactively applied to Virginia taxpayers taxed under a similar statute. *Chevron* discusses whether a ruling which shortens a limitations period should be retroactively applied.

Chevron sets forth the following three-pronged test to determine when a holding of the United States Supreme Court should not be retroactively applied:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " 404 U.S. at 106-107, 92 S.Ct. at 355, 30 L.Ed.2d at 306.

The facts in the present case pass the three-pronged *Chevron* test for nonretroactivity. The United States Supreme Court's opinion in *Bendix, supra,* was the first time that any court of binding authority in Ohio's state courts had ruled R.C. 2305.15 unconstitutional. When Hyde was injured, she could not have foreseen that R.C. 2305.15 would be struck down four years later. "The most [s]he could do was to rely on the law as it then was." *Chevron,* 404 U.S. at 107, 92 S.Ct. at 356, 30 L.Ed.2d at 306.

Because of the factual similarities between the present case and *Chevron,* it is unnecessary to discuss the other two prongs of the *Chevron* test. The *Chevron* court held that the retroactive application of a rule shortening the limitations period in a tort case fulfilled the last two requirements of the test for nonretroactivity. Because all three requirements of the *Chevron* test are likewise fulfilled in this case, we determine that *Bendix* cannot be retroactively applied.

[244] Even if the *Chevron* test has been replaced by *Harper,* the retroactive application of *Bendix* remains impermissible.

In *Harper,* the United States Supreme Court determined that its prior decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, should be retroactively applied. The *Davis* decision declared that it was unconstitutional for the state of Michigan to tax retirement benefits paid by the federal government when that state exempts retirement benefits paid by the state or its political subdivisions. The state of Virginia, in *Harper,* argued that *Davis* should not be retroactively applied.

The United States Supreme Court rejected Virginia's argument, holding that *Davis* must be retroactively applied. However, the Supreme Court declined to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." *Harper, supra,* 509 U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88. The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, " 'retains flexibility' " in fashioning appropriate relief. *Id.* at _____, 113 S.Ct. at 2518, 125 L.Ed.2d at 89, quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco* (1990), 496 U.S. 18, 39-40, 110 S.Ct. 2238, 2252, 110 L.Ed.2d 17, 38. *Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied.

The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix,* we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

In *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 512 N.E.2d 626, this court held that "R.C. 2305.11(B), as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution." *Id.* at syllabus.

[245] In *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62, 609 N.E.2d 140, 142, we proclaimed that when the Ohio Constitution speaks of remedy for injury to person, property or reputation, it requires an opportunity for redress that is granted at a meaningful time and in a meaningful manner.

It is hard to imagine a right to a remedy less meaningful than one which, while valid at the time an individual is injured, is subsequently revoked. This is precisely the outcome that a retroactive application of *Bendix* dictates. In not filing her complaint against RCC until 1987, Hyde relied on Ohio's tolling statute, R.C. 2305.15, and the most recent interpretation of that statute by the court of appeals in her appellate district, *May v. Leidli* (1986), 32 Ohio App.3d 36, 513 N.E.2d 1347. No court of binding precedent in Ohio had ever ruled that R.C. 2305.15(A) was unconstitutional. Nearly one year after Hyde's complaint was filed, *Bendix* was announced.

At the time Hyde was injured, she possessed a state constitutional civil right to file a lawsuit relying on R.C. 2305.15(A). This right conflicts with a federal rule of decision, which requires the retroactive application of federal rules of law such as the *Bendix* decision.

We find that when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution,

such as retroactivity, the state civil right prevails. As we noted in *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 616 N.E.2d 163, paragraph one of the syllabus:

> "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."

In this case, the federal rule of decision—retroactivity—is not rooted in the United States Constitution. The United States Supreme Court may strike down provisions in the Ohio Constitution when they are unconstitutional, but may not invalidate them simply because they conflict with a court-created doctrine of uniformity, such as the requirement that decisions be retroactively applied.

This conflict between the federal rule of retroactivity and Ohio's right to a remedy must be resolved in favor of the state constitutional civil right.

Our decision today does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows Section 16, Article I of the Ohio Constitution and the Commerce Clause of the federal Constitution to co-exist.

[246] Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision.

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings.

Judgment reversed, and cause remanded.

A.W. SWEENEY, DOUGLAS, RESNICK and F.E. SWEENEY, *JJ.*, concur.

MOYER, C.J., and WRIGHT, *J.*, dissent.

WRIGHT, *J.*, dissenting. The issue in this case is whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896, applies retroactively to bar appellant's personal injury claim. The majority answers this question with a confusing opinion containing an assortment of retroactivity doctrine. Present in the opinion are two rules of federal law, only one of which is actually described, and one brand new and unsupportable rule of state law.

I

The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.[2]

[2] The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion.

But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74. Then without even so much as describing the new rule from *Harper* (*i.e.*, the holding), the majority goes on to state the correct but wholly irrelevant fact that the plaintiffs in *Harper* were not necessarily entitled to a refund of the taxes and that the state of Virginia retained some flexibility in fashioning appropriate relief. Based on this discussion of the appropriate remedy for the plaintiffs in *Harper*, the majority makes the extraordinary statement that "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied." The [247] majority then proceeds to use this statement as the foundation for its new state law rule of retroactivity.

Such a statement would not merit much attention were it not for the fact that the remainder of the majority's opinion rests in its entirety on this "new rule." It is indeed curious that a discussion of "tailoring a remedy" has even surfaced in this case. After all, this case has not yet proceeded beyond the pleading stage. No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case.

Moreover, the question of an appropriate remedy for the plaintiffs in *Harper* arose only because the plaintiffs sought a *refund* of taxes, and, as the court noted, federal law does not necessarily entitle them to a refund. *Id.*, 509

U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88. Instead, the court held that the state of Virginia could choose any relief it wished so long as that relief was " 'consistent with federal due process principles.' " *Id.*, quoting *Am. Trucking Assns., Inc. v. Smith* (1990), 496 U.S. 167, 181, 110 S.Ct. 2323, 2332, 110 L.Ed.2d 148, 161. One commentator has suggested that Virginia could impose retroactive taxes on state retirees, along with retroactive pension increases to offset the resulting tax liability. See Rakowski, *Harper* and Retroactive Remedies: Why States' Fears are Exaggerated (1993), 59 Tax Notes 555, 558-559. No one has suggested, however, that states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper,* which is precisely what the majority accomplishes with its ruling.

What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra,* 496 U.S. at 177, 110 S.Ct. at 2330, 110 L.Ed.2d at 159, that "[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—*is a matter of federal law.*" (Emphasis added.) Quoting this language, the court in *Ashland Oil, Inc. v. Caryl* (1990), 497 U.S. 916, 918, 110 S.Ct. 3202, 3204, 111 L.Ed.2d 734, 737, refused to apply the West Virginia Supreme Court's state-law criteria for retroactivity, stating instead that the court must examine whether to

give retroactive effect to a constitutionally based decision "in light of *our* nonretroactivity doctrine." (Emphasis added.)

[248] Finally, the Virginia Supreme Court in *Harper* had attempted to deny retrospective effect to the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, by resting its judgment on "independent and adequate" state grounds. The United States Supreme Court rebuffed the Virginia court's effort at avoiding the application of federal rules of retroactivity by stating:

> "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law * * * cannot extend to their interpretations of federal law." *Id.*, 509 U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88.

However stated, it is clear that federal law controls the issue before us. The majority cites *no* authority for its assertion in Part II of its opinion that a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution must be resolved in favor of the state civil right. Commentators who have examined the issue would disagree. The federal rule of retroactivity—called a federal rule of decision by the majority—is not, as the majority correctly points out, rooted in the Constitution. See *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579, 586 ("retroactive application [of judicial decisions] is not compelled, constitutionally or otherwise"). Instead it may be described as a federal

common-law rule. See Field, Sources of Law: The Scope of Federal Common Law (1986), 99 Harv.L.Rev. 883, 890 (defining "federal common law" as "any rule of federal law created by a court * * * when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional" [emphasis deleted]). Regardless of its origin, however, federal common law is still "law" within the meaning of the Supremacy Clause and is binding on state court judges. *Id.* at 897 and fn. 64. For this reason, and because the statements by the Supreme Court in the above-mentioned cases directly contradict the majority's assertion, I believe that in this case we cannot apply a state rule of retroactivity. We are bound by the Supremacy Clause of the United States Constitution to apply federal law, even if we believe the application of state law would produce a more palatable result.

The strict rule of retroactivity in the civil context announced by the court in *Harper* is as follows: "[T]his Court's application of a rule of federal law to the parties before the Court requires *every court* to give retroactive effect to that decision." (Emphasis added.) *Id.*, 509 U.S. at _____, 113 S.Ct. at 2513, 125 L.Ed.2d at 81. I do agree with the majority that there is a serious question as to whether *Chevron* remains good law after the decision in *Harper*. The court in [249] *Harper* did not analyze the retroactivity question under *Chevron* but instead created a rule of strict retroactivity similar to the rule of retroactivity in the criminal context as set forth by the court in *Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. The *Harper* court did state, however, that the normal rule of retroactive application of its decisions must be followed "[w]hen this Court does not 'reserve the question whether its holding should be applied to the parties before it[.]' " *Id.*, 509

U.S. at _____, 113 S.Ct. at 2518, 125 L.Ed.2d at 86-87, quoting *James B. Beam Distilling Co. v. Georgia* (1991), 501 U.S. _____, _____, 111 S.Ct. 2439, 2445, 115 L.Ed.2d 481, 490. Thus, at best it seems that *Chevron* remains good law only when the court reserves the question of retroactivity.

The court in *Bendix* did not reserve the question of retroactivity. Instead the court applied the decision to the parties before it by affirming the dismissal of the plaintiff's cause of action. *Bendix*, 486 U.S. at 895, 108 S.Ct. at 2222-2223, 100 L.Ed.2d at 905. Therefore, under the rule announced in *Harper*, we must give retroactive effect to the *Bendix* decision. Appellant is thus prohibited from using the unconstitutional tolling provision, former R.C. 2305.15, and her claim, filed more than three and one-half years after her accident, is barred by the two-year statute of limitations for personal injury actions. See R.C. 2305.10.

II

I quite agree with the majority that the Ohio Constitution is a "document of independent force" and that we therefore need not always proceed in lock-step fashion with the United States Supreme Court on constitutional matters. And if this case involved individual rights or civil liberties, areas in which the United States Constitution merely sets a floor for our decisions, I might feel inclined to hold that the Ohio Constitution can form the basis for our opinion. But this case deals with the question of whether to give retroactive effect to a case decided by the United States Supreme Court on Commerce Clause grounds. The Commerce Clause does not implicate individual rights and civil liberties, it simply allocates power between the

federal government and the states. The court in *Bendix* ruled that Ohio has no power, under the Commerce Clause, to toll its statute of limitations against out-of-state entities. The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute, that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal.

III

The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is [250] binding on the states under the Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent.

MOYER, *C.J.*, concurs in the foregoing dissenting opinion.

JUDGMENT ENTRY AND OPINION OF THE COURT OF APPEALS, ELEVENTH DISTRICT, ASHTABULA COUNTY, OHIO

(Filed July 2, 1992)

No. 91-A-1660

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
) ss.
COUNTY OF ASHTABULA)

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY

For the reasons stated in the Opinion of this court, the assigment of error is without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge for the Court

[1] Accelerated Case No. 91-A-1660

COURT OF APPEALS
ELEVENTH DISTRICT
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants-Appellees.

J U D G E S

HON. JUDITH A. CHRISTLEY, *P.J.*,
HON. JOSEPH E. MAHONEY, *J.*,
HON. ROBERT A. NADER, *J.*

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 85710

JUDGMENT: Affirmed.

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O P I N I O N

[2] CHRISTLEY, *P.J.*

This is an accelerated calendar case, but one that requires us to consider an issue that has not been considered before by this court, nor has it been considered by the Ohio Supreme Court. Appellant, Carol L. Hyde, is appealing the Ashtabula Court of Common Pleas' judgment entry granting the motion to dismiss appellant's complaint filed by appellees, Reynoldsville Casket Co. and John Blosh.

The basic facts of this case are not in dispute. On March 5, 1984, appellant was a passenger in a motor vehicle which was involved in a collision with a truck driven by appellee John Blosh and owned by appellee Reynoldsville Casket Co. in Ashtabula County. As a result of the collision, appellant suffered substantial injuries.

On August 11, 1987, appellant filed her complaint, almost three and half years after the collision. On October 13, 1987, appellees filed their answer, and asserted as an affirmative defense that appellant's claims were barred by the statute of limitations.

On February 8, 1988, appellees filed a joint motion to dismiss pursuant to Civ. R. 12(B)(6) and R.C. 2305.10 which imposed a two-year statute of limitations for personal injury claims. The Ohio savings clause, R.C. 2305.15, became an issue in that both of appellees' addresses were in Pennsylvania. Appellee, Reynoldsville Casket Company, was [3] an out-of-state corporation without offices in Ohio, and was unlicensed as a foreign corporation to do business in Ohio. Several briefs on this matter were filed by appellant and appellees.

On July 31, 1991, the trial court issued a very well reasoned judgment entry dismissing appellant's complaint. As a result, appellant timely filed her notice of appeal. She now raises one assignment of error:

> "The trial court erred in granting Defendant's Motion to dismiss Plaintiff's Complaint."

Although appellant only raises one assignment of error, she divides this error into three separate issues. The first issue raised by appellant is that the R.C. 2305.15, the savings clause, tolls the statute of limitations as to a cause of action against an out-of-state person or corporation.

This court concedes that on its face R.C. 2305.15 is applicable to this case. It states:

> "(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his [4] absence of concealment shall not be computed as any part of a period within which the action must be brought." *Id.*

Nevertheless, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 889, specifically held that R.C. 2305.15 was unconstitutional in that it violated the Commerce Clause, imposing an impermissible burden on interstate commerce under such facts. The factual scenarios of *Bendix, supra,* and the present case are too similar for us to meaningfully distinguish.

Bendix, a Delaware corporation with its principal place of business in Ohio, entered into a contract with Midwesco Enterprises, an Illinois corporation with its principal place of business in Illinois, for the delivery and installation of a boiler system at Bendix's Ohio facility. Midwesco was not registered to do business in Ohio and, as such, had not appointed an agent for service of process. Under R.C. 1703.02, Midwesco was not required to register with the State of Ohio because it only installed equipment in Ohio.

A contract dispute arose leading Bendix to file suit. Midwesco asserted Ohio's statute of limitations as a defense. Bendix relied on R.C. 2305.15, Ohio's savings clause, in its response that the limitation period had not [5] passed.

The Supreme Court held where a state denies an ordinary legal defense or privileges to out-of-state individuals or corporations engaged in commerce, that state law will be reviewed under the Commerce Clause. It is not a sufficient explanation that serving a foreign corporate defendant may be more arduous than serving a domestic corporation where a long-arm statute is available.

In finding the statute imposed a significant burden on interstate commerce, the Court noted that the Ohio statute forced a foreign corporation to choose between appointing a statutory agent and exposing itself to the general jurisdiction of Ohio courts or force it to forfeit its statute of limitations defense. *Id.* at 893.

This leaves a foreign corporation with two equally undesirable options. If a foreign corporation appoints a statutory agent, it subjects itself to Ohio's general jurisdiction, *i.e.,* the corporation could be sued in Ohio

regardless of whether the transaction in question had any connection with Ohio; or if a statutory agent is not appointed, a corporation potentially subjects itself to suit in perpetuity.

In other words, either a foreign corporation has to forego its R.C. 1703.02 exemption, submitting itself to the general jurisdiction of the Ohio courts or forego a defense [6] of the statute of limitations. "In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations." *Id.* at 894.

Appellees find themselves in precisely that precarious situation. As a corporation, engaged solely in interstate commerce, it is exempt from registering with the state and appointing a statutory agent pursuant to R.C. 1703.02.

Under R.C. 2305.15, the only reason appellant argues that the statute of limitations is inapplicable is that appellee, Reynoldsville Casket, was an out-of-state foreign corporation without a statutory agent in Ohio. As in *Bendix, supra*, the statute of limitations would be unattainable, thus an ordinary legal defense would be denied to appellee. Appellees are, therefore, burdened by limitless liability for lack of a statute of limitations. Domestic corporations are not so burdened. Based on the United States Supreme Court's application of the Commerce Clause, in *Bendix, supra*, R.C. 2305.15 is unconstitutional as it applies to appellee Reynoldsville Casket Co.

Additionally, this same logic is applicable to appellee John Blosh. As the trial court stated in its judgment entry, the complaint alleged that appellee John Blosh

was involved in the collision while in the scope of his [7] employment. Blosh, as an employee of Reynoldsville Casket Co., was involved in interstate commerce. Moreover, as an individual, he did not even have the option of registering with the Secretary of State. See, *Abramson v. Brownstein* (C.A. 9 1990), 897 F.2d 389; *Tesar v. Hallas* (N.D. Ohio 1990), 738 F. Supp. 240 (applying *Bendix, supra*, to individuals.) An individual engaged in interstate commerce should be afforded the same protection and defenses as a corporation.

This court would also note that there was absolutely no evidence that either appellee had absconded or attempted to avoid process. Both appellees remained at all times subject to jurisdiction under the long arm statutes, R.C. 2307.381, *et seq.* and Civ. R. 4.3.

Under such facts, and pursuant to the Commerce Clause, R.C. 2305.15 is unconstitutional.

Appellant cites numerous Ohio Supreme Court and appellate cases all predating the United States Supreme Court's ruling in *Bendix, supra*. Given the explicit ruling in *Bendix* on Ohio's savings clause, we find that precedent to be no longer binding upon this court, specifically, our district's case, *May v. Leidli* (1986), 32 Ohio App. 3d 36.

The second issue raised by appellant is that R.C. 2305.15 was deemed unconstitutional only as it applied to the specific factual situation in *Bendix supra*. There may [8] be certain applications of the statute which are constitutional, (where a defendant is beyond the reach of the long arm statute, see Justice Scalia's concurring opinion, *Bendix, supra*, at 898). The present case, however, cannot be distinguished from *Bendix*. As such, this issue is also without merit.

Finally, appellant argues that *Bendix, supra*, should only be applied prospectively, and not to the parties in this case.

The general rule in Ohio is:

> " ' * * *(A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. * * *' " *State, ex rel. Tavenner, v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90, quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.

An unconstitutional act of the general assembly is a nullity. *State, ex rel. Cline, v. Vail* (1911), 84 Ohio St. 399, paragraph one of syllabus; *State, ex rel. Bartlett, v. The Buckeye State Bldg. & Loan Co.* (1940), 67 Ohio App. 334.

Recently, the Cuyahoga County Appellate Court applied an Ohio Supreme Court decision effecting a statute of limitations retrospectively. *Obral v. Fairview General Hospital* (1983), 13 Ohio App. 3d 57. The Supreme Court in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. [9] 3d 111, held, while the *Obral* case was pending, that the medical malpractice statute of limitations would commence one year after discovery overruling previous precedent stating that the statute began to run on the last date of treatment. The court of appeals held that:

> "Since *Oliver* was decided while this appeal was still pending and because no vested or contractual rights will be affected, the 'date of discovery' rule applies to this case." *Obral, supra*, at 60.

Moreover, this court does not accept appellant's argument that under *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, *Bendix* should only be applied

prospectively. *Chevron* set forth three criteria to be considered when determining whether a ruling should be considered retroactively: (1) is there a clear break with past law; (2) would retroactive application further or retard operation of the new rule; and (3) could retroactive application "produce substantial inequitable results."

In *Juzwin v. Asbestos Corp. Ltd.* (C.A. 3, 1990), 900 F. 2d 686, the court under similar facts to the present case, applied the *Chevron* factors and determined that the statute of limitations had run. Specifically, the plaintiff filed an action against an out-of-state corporation after the statute had run. The plaintiff was depending upon a New Jersey tolling statute which had been found to be [10] unconstitutional under the Commerce Clause while the case was pending. The plaintiff argued that the decision invalidating the New Jersey statute should only be applied prospectively.

The *Juzwin* court noted that the person arguing in favor of prospective application bears the burden.

Considering the first *Chevron* factor, it is clear that both in the *Juzwin* case and the present case that there is a clear break in the law. But it is also true that the constitutionality of the tolling statutes have long been questioned. See, *Title Guaranty & Surety Co. v. McAllister, Admx.* (1936), 130 Ohio St. 537; *Thompson v. Horvath* (1967), 10 Ohio St. 2d 247.

The second factor to be considered is whether retrospective application would advance or retard operation of the new rule. The *Juzwin* court held that retrospective application would bring New Jersey in conformity with the majority of other states. Therefore, it chose to implement the statute retrospectively. Likewise, the same argument applies in the present case.

Finally, the *Juzwin* court considered whether retrospective active application would produce a substantially inequitable result. Weighing the interests of both parties, the *Juzwin* court concluded that to continue to apply a different statute to out-of-state corporations [11] weighed more heavily. The same analysis is applicable to the present case.

In addition, other Ohio courts have also applied *Bendix, supra,* retrospectively. *Mark v. Mellott Mfg. Co., Inc.* (Sept. 13, 1989), Ross App. No. 1494, unreported; *Irby v. Minnetonka, Inc.* (Feb. 26, 1988), Mahoning App. No. 87 C.A. 88 unreported. In fact, this court would note that both cases followed the precedent issued by the federal appellate case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (C.A. 6, 1987), 820 F.2d 186, before it was affirmed by the United States Supreme Court. Based on the above analysis, the trial court did not err in applying *Bendix* retrospectively.

Appellant's assignment of error is without merit.

The judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge

MAHONEY, *J.*,
NADER, *J.*,
concur.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed July 31, 1991)

Case No. 85710

[1] IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
Plaintiff,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants.

JUDGE YOST

JUDGMENT ENTRY

This cause came on for consideration of defendants' Motion to Dismiss, originally filed on February 8, 1988. The matter has been thoroughly and quite excellently briefed by counsel for plaintiff and defendants. The court has reviewed the pleadings and record herein, along with the memoranda filed in support of and contra to the Motion to Dismiss.

The facts, insofar as they are relevant to the motion, are undisputed. On March 5, 1984, the plaintiff was a passenger in a motor vehicle involved in a collision with a vehicle driven by defendant, John Blosh, and owned by defendant, Reynoldsville Casket. The collision occurred

at the intersection of State Routes 167 and 193 in Denmark Township, Ashtabula County, Ohio. Plaintiff suffered substantial injuries as a result of the collision. Plaintiff's Complaint was filed August 11, 1987, nearly three and one-half (3½) years after the collision. The statute of limitations for a cause of action of this nature is two (2) years, R.C. §2305.10. The issue to be determined by the court is the applicability and effect the Ohio Tolling Statute, R.C. §2305.15. R.C. §2305.15(A) provides:

> When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, [2] 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Crucial to the determination of the issue is an interpretation of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 100 Lawyers Edition 2d 896. This case originated in the United States District for the Northern District of Ohio, and the decision in the Sixth Circuit Court of Appeals provided the principal basis for defendants' original motion. Since the motion in this case has been pending, the Supreme Court has affirmed the holding of the Sixth Circuit.

Bendix, supra, involved a simple contract dispute. Midwesco Enterprises installed a boiler system at a Bendix plant in Ohio. Bendix claimed that the boiler system had been installed improperly, which led to an action for breach of contract being filed by Bendix in the

District Court for the Northern District of Ohio. Bendix is a Delaware Corporation with its principal place of business in Ohio. Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio.

Midwesco asserted the Ohio statute of limitations defense. Bendix responded that the statutory period had not elapsed because under Ohio law, running of the time is suspended or tolled for claims against entities that are not within the state and have not designated an agent for service of process. The court stated:

> Although statute of limitations defenses are not a fundamental right, . . . it is obvious that they are an integral part of the legal system and are relied [3] upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. *Bendix Autolite Corporation v. Midwesco Enterprises, Inc., supra, at 893.*

The *Bendix* court reasoned that to gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts, thus extending jurisdiction to any suit against Midwesco, whether or not

the transaction in question had any connection with Ohio. "The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity." *Bendix, supra,* at 893. The court therefore found that the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the state might advance.

Review of the facts and the court's reasoning in *Bendix* leads to the conclusion that the instant case cannot be meaningfully distinguished from the *Bendix* case. First, like Reynoldsville Casket, Co., Midwesco had no corporate office in Ohio, had not registered to do business here and had not appointed an agent for service of process in this state. Further, it appears that Midwesco would also have been exempt from the registration requirement pursuant to R.C. §1703.02 because it had only installed equipment in Ohio. *Bendix* appears to be directly on point with the facts of the instant case. The point of the *Bendix* desision is that under Ohio law a corporation is placed in [4] a situation in which it has a choice of either subjecting itself to the general jurisdiction of the Ohio courts by registering, or to forego the protection of the statute of limitations, thus, "forcing" registration to insure the availability of the statute of limitations defense. This burden on out-of-state entities is a violation of the Commerce Clause.

The court notes that the *Bendix* decision did not declare R.C. §2305.15 *per se* unconstitutional for all purposes. As pointed out in the concurring opinion of Justice Scalia, "[a] tolling statute that operated only against persons beyond the reach of Ohio's long-arm statute, or against all persons that could not be found for mail service, would be narrowly tailored to advance

the legitimate purpose of preserving claims; but the present statute extends the time for suit even against corporations which (like appellee) are fully suable within Ohio, and readily reachable through the mails." *Bendix, supra,* at 898. Nevertheless, the *Bendix* case did declare the statute unconstitutional as it would be applied to the facts of the present case, because the factual situtation is virtually indistinguishable from that in *Bendix.* Based upon the application of the Commerce Clause by the U.S. Supreme court, the defendant, Reynoldsville Casket Co., must prevail on its Motion to Dismiss.

The foregoing reasoning is not as clear in its application to defendant, John M. Blosh. The argument that the *Bendix* decision should also be extended to Blosh is persuasive. The Complaint alleges that Blosh was involved in the collision in the scope of his employment with Reynoldsville. Reynoldsville was engaged in interstate commerce. Thus, Blosh, as part of his employment, was engaged in interstate commerce. Blosh is faced with a more onerous choice than Reynoldsville, because Blosh could not even [5] register with the Secretary of State if he chose to do so. His home and employment are out of state. Thus, he could either remain in the State of Ohio, or return to Pennsylvania to his home and job, and essentially waive the defense of the statute of limitations allowing the claim to remain viable forever.

At least one federal court has extended the *Bendix* decision to an individual. Citing *Bendix,* the court in *Abramson v. Brownstein* (9th Cir. 1990), 897 F.2d 389, affirmed the district court's dismissal of a complaint filed against an out-of-state resident engaged in interstate commerce, when the complaint was filed past the date on which the statute of limitations had run. The

court found that the California statutory scheme forced a nonresident to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity. On the other hand, the state's interest in applying the tolling statute was that a defendant's physical absence impeded his availability for suit and it would be inequitable to force a claimant to pursue a defendant out of state. The *Abramson* court noted that like the defendant in *Bendix*, the defendant could have been served under the long arm statute. Since the state's interest was the same as that advanced in *Bendix*, which the *Bendix* court found could not support the burden placed on interstate commerce, the *Abramson* court found the tolling statute to be unconstitutional.

In *Tesar v. Hallas* (N.D. Ohio 1990), 738 F. Supp. ~~216~~, [240] the plaintiff filed a libel complaint against a reporter who had written an article while employed at the Plain Dealer in Cleveland, Ohio. The reporter subsequently moved out of state to take a job with a newspaper in Pennsylvania. The complaint was filed after the one year statute of [6] limitations, but the plaintiff maintained that the suit was timely because the statute of limitations was tolled by R.C. §2305.15, when the defendant moved out of state for his new job.

The *Tesar* court noted that interstate commerce is affected when persons move between states in the course of or in search for employment and that the ability of businesses to recruit out of state personnel would be adversely affected if these potential employees must forfeit statute of limitations protection. "Following *Bendix's* holding that requiring foreign corporations to submit to the general jurisdiction of Ohio courts 'is an unreasonable burden on commerce,' it seems plainly

'unreasonable' for persons who have committed acts they know might be tortiuos to be held hostage until the applicable limitations period expires." *Tesar, supra,* at 242. Because Hallas had no mechanism by which he could register with the state for service purposes, he would have had to choose between travelling out of state for his new job or enjoying the protection of the statute of limitations. Thus, the court found the tolling statute unconstitutional as the plaintiff sought to have it applied to Hallas.

If there was evidence that either of the defendants in this case had absconded, or concealed themselves for the purpose of avoiding process, or were otherwise not amenable to service of process, then the legitimate purposes of the tolling statute would be served by denying them the benefit of the statute of limitations. Both defendants remained at all times subject to jurisdiction under the long arm statutes, R.C. §2307.381, *et seq.* Civ. R. 4.3 provides the method for out-of-state service of process. Defendant, Blosh, was acting within the field and scope of his employment with defendant, [7] Reynoldsville Casket Co., at the time of the collision, and thus was engaged in interstate commerce, as much as his employer. On the facts of this case, the court holds that it is only logical that the *Bendix* decision should apply to Blosh as well as Reynoldsville.

IT IS, THEREFORE, THE ORDER AND JUDGMENT of the court that plaintiff's Motion to Dismiss the complaint is sustained.

Costs are assessed against plaintiff.

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

/S/ GARY L. YOST, *Judge*
CIV-C-18

July 31, 1991

cc: David J. Eardley
William E. Riedel

REHEARING ENTRY OF THE SUPREME COURT OF OHIO

(Dated April 6, 1994)

Case No. 92-1682

THE SUPREME COURT OF OHIO

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

To wit: April 6, 1994

REHEARING ENTRY

(Ashtabula County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 91A1660).

/s/ THOMAS J. MOYER
Chief Justice

CONSTITUTIONS INVOLVED

United States Constitution—Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Ohio Constitution—Article I, Section 16

§16 [Redress in courts].

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

STATUTES INVOLVED

Ohio Revised Code, Section 2305.10

TORTS

2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to

such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

HISTORY: GC §11224-1; 112 v 237; Bureau of Code Revision, 10-1-53; 138 v H 716 (Eff 6-12-80); 139 v S 406 (Eff 8-26-82); 140 v H 72. Eff. 5-31-84.

Ohio Revised Code, Section 2305.15

SAVINGS PROVISIONS

2305.15 Saving clause.

When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

HISTORY: GC §11228; RS §4989; S&C 950; 51 v 57, §21; 129 v 13(177). Eff. 7-1-62.

Ohio Revised Code, Section 2305.15(A)

SAVINGS PROVISIONS

2305.15(A) Saving clause.

(A) When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

HISTORY: RS §4989; S&C 950; 51 v 57, §21; GC §11228; Bureau of Code Revision, 10-1-53; 129 v 13 (177) (Eff 7-1-62); 141 v S 151. Eff. 7-9-86.

No. 94-3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

v.

CAROL L. HYDE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether state courts may fashion a remedy which provides for access to their courts when a decision of the U.S. Supreme Court is retroactively applied to divest litigants of an accrued right guaranteed them by the state constitution.

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OCTOBER TERM, 1994

No. 94-3

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

v.

CAROL L. HYDE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT OF GENERAL INTEREST, DOES NOT INVOLVE AN UNSETTLED QUESTION OF FEDERAL CONSTITUTIONAL OR STATUTORY LAW, AND DOES NOT INVOLVE A DECISION WHICH CONFLICTS WITH GOVERNING SUPREME COURT PRECEDENT.

In 1988, this Court held that an Ohio statute which tolled the limitations period for filing civil lawsuits was unconstitutional. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 100 L.Ed. 2d 896, 108 S.Ct. 2218 (1988). The Ohio Supreme Court in *Hyde v. Reynoldsville Casket Company* (1994), 68 Ohio St. 3d 240, 626 N.E. 2d 75 retroactively applied that de-

cision, but following *Harper v. Virginia Department of Taxation*, 509 U.S. ——, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993), fashioned a remedy for Ohio litigants who would otherwise be deprived of their vested rights guaranteed under the Ohio Constitution. The state court interpreted the clause of the Ohio Constitution that provided a right to a remedy in Ohio courts to require the Ohio Supreme Court to fashion a remedy for litigants who would otherwise be barred from suits as a result of the retroactive application of *Bendix*. In *Harper*, this Court recognized that state courts may fashion remedies to protect the rights of parties affected by the retroactive application of decisions of this Court.

This case does not merit full review by this Court, as it affects only a small number of Ohio litigants,[1] and is not of general interest to the citizens of the United States.

The *Hyde* case commenced with the timely filing of a Complaint in state court for personal injuries. The Plaintiff, Ms. Hyde, had taken advantage of an Ohio statute that tolled the limitations period for claims against out of state corporations. Subsequent to the timely filing of

[1] Except for Respondent herein, only a few other Ohio residents are affected by *Hyde, supra*. Each of these other Ohio residents claim injury from their use of the Dalkon Shield IUD, and each of them had claims filed in court prior to *Bendix, supra*. None of them has been permitted to proceed to litigation—all lawsuits (and statutes of limitation) were tolled when the manufacturer of the Dalkon Shield IUD, the A.H. Robbins Company, filed a petition in bankruptcy on August 21, 1985, in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond division.

The Ohio Dalkon Shield victims will soon be emerging from bankruptcy, and *Hyde* preserves their vested right to continue the pursuit of their claims in court. If the Ohio Supreme Court in *Hyde* had applied *Bendix* retroactively without benefit of the remedy mandated by *Harper, supra*, then some of the Ohio Dalkon Shield victims would have emerged from bankruptcy to find their vested, tolled and timely filed causes of action had been extinguished in contravention of the mandates of the Ohio Constitution's "right to a remedy" clause.

her claim, this Court held the statute upon which she relied unconstitutional. See, *Bendix, supra*. Thereafter, her case was dismissed on the authority of *Bendix*. In *Hyde, supra*, the Ohio Supreme Court reversed, holding that the retroactive application of *Bendix* did not mandate that she be deprived of her day in court under the circumstances.

The Ohio tolling provision, as it purports to apply to out of state corporations, is now known to be unconstitutional, and has been so since 1988, when this Court decided *Bendix*. Accordingly, the *Hyde* ruling will affect only the rights of litigants whose actions have been pending since that time: the parties herein, and the few Dalkon Shield victims whose claims have accrued, but who have not yet fully asserted their rights. Petitioners therefore seek to have this Court review a case which will affect only a very small number of persons in a very limited set of circumstances and which will not result in a general rule of federal constitutional, statutory, or decisional law.

Furthermore, the case *sub judice* does not involve any unsettled question of federal constitutional law. This Court's retroactivity doctrine was recently set forth in *Harper, supra*, and *Griffith v. Kentucky*, 479 U.S. 314, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987), which held that if this Court applies a rule to the parties before it, then the rule will be retroactive to all pending cases, subject to the state court's right to fashion a remedy once retroactive application has occurred. *Harper, supra* at 86, 89.

Here, Petitioners do not seek clarification of this Court's retroactivity doctrine, but instead seek to have this Court correct what they view as an erroneous decision by the Ohio Supreme Court. In their Petition, they merely rehash the arguments that they made before the Ohio court. The Ohio Court's decision, however, does not involve a constitutional question which requires this Court's attention. The Petition fails to demonstrate the existence of

either an unsettled question of federal constitutional law, or an unsettled question of federal statutory law.

Furthermore, as the Ohio Supreme Court followed this Court's mandate in *Harper, supra,* by retroactively applying *Bendix* but fashioning a remedy consistent with the state constitutional mandate, its decision does not conflict with the governing precedent set by this Court. Therefore, no conflict exists between the Ohio Court's decision and the mandate established by this Court. Consequently, the Petition for Certiorari should be denied.

II. THE JUDGMENT OF THE OHIO SUPREME COURT RESTS UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND WHICH PRECLUDES REVIEW IN THIS COURT.

The Ohio Supreme Court rested its decision upon § 16, Article I of the Ohio Constitution. Article I, § 16 provides:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay."

Article I, § 16 is unique to Ohio law, in that it is a constitutional provision which provides a "right to a remedy" in the courts of Ohio. The citizens of Ohio placed this protection into the Bill of Rights of the 1851 Ohio Constitution.

The right to a remedy under the Ohio Constitution is one which has consistently been protected by the Ohio Supreme Court. The Ohio Supreme Court has mandated that once a right exists, the court is bound by this constitutional provision to provide a remedy. *Kintz v. Harringer* (1919), 99 Ohio St. 240, 124 N.E. 168. Because the retroactive application of *Bendix* deprived litigants of their rights, the Ohio Supreme Court fashioned a remedy for those litigants as permitted by *Harper*.

In doing so, the Ohio Supreme Court grounded its decision in part upon its interpretation of the Ohio Constitution explaining:

> "Our decision today does not contravene the federal constitutional analysis in *Bendix,* but, instead, allows § 16, Article I of the Ohio Constitution and the commerce clause of the Federal Constitution to coexist."

This Court has consistently declined to review the judgment of a state court that rests upon an adequate and independent ground in state law. *Herb v. Pitcairn,* 324 U.S. 117, 128, 89 L.Ed. 789, 65 S.Ct. 459 (1945). Accord, *Honeyman v. Hanan,* 300 U.S. 14, 18-19, 81 LEd. 476, 57 S.Ct. 350 (1937); *Fox Film Corp. v. Muller,* 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935).

The jurisdiction of this Court to review a decision of a state supreme court arises only in those instances where the federal ground was the sole basis for the decision, or where the state constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. *Mental Hygene Department v. Kirchner,* 380 U.S. 194, 198, 13 L.Ed. 2d 753, 85 S.Ct. 871 (1965). Where the non-federal ground for judgment is independent of the other ground; and broad enough to sustain the judgment, then this court will not disturb the State judgment. *Enterprise Irrigation District v. Farmer's Mutual Canal Company,* 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1917). Equal reliance upon federal and state substantive grounds has been held sufficient to preclude Supreme Court review. *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487, 13 L.Ed. 2d 439, 85 S.Ct. 493 (1965).

Here, the judgment of the Ohio Supreme Court rests upon an interpretation and application of its state constitutional provision for redress in its courts. The Ohio Constitution provides a right to a remedy to those individuals who have acquired a vested right under the

state of the law at the time their action was filed. Vested rights accrue when a litigant relies upon a statute of limitations during the time period when the complaint is filed. *Adams v. Sherk*, 32 Ohio St. 2d 61, 446 N.E. 2d 165 (1983). Therefore, under Ohio constitutional law, decisions of the Ohio Supreme Court may not be retroactively applied to divest parties of rights vested under the prior law. *Peerless Electric Company v. Bowers*, 164 Ohio St. 209, 129 N.E. 2d 467 (1955).

The application of Ohio's Constitution by the Ohio Supreme Court is clearly an adequate and independent ground for relief in this matter. The Ohio Supreme Court correctly held that Respondent had filed her claims in reliance upon the state of the law prior to the *Bendix* decision. Respondent's justifiable reliance upon the existing law vested within her the constitutional civil rights provided to her by Article I, § 16 of the Ohio Constitution. That civil right cannot be taken away by a retroactive application of law.[2]

In applying and interpreting § 16, Article I of the Ohio Constitution, the Ohio Supreme Court has rested its decision upon an adequate and independent state ground for relief. That independent ground precludes this Court from review of that decision.

III. THE OHIO SUPREME COURT CORRECTLY TAILORED ITS REMEDY TO THE RETROACTIVE APPLICATION OF THE *BENDIX* DECISION CONSISTENT WITH THE MANDATES OF THE OHIO CONSTITUTION.

As this Court has recognized, where a decision is retroactively applied, state courts are left with the obligation to provide relief consistent with federal due process prin-

[2] The Ohio Supreme Court has held that the retroactive application of a legislative amendment to a statute of limitations period which results in the total obliteration of an individual's existing substantive rights will be prohibited. *Cook v. Matvejs*, 56 Ohio St. 2d 234, 383 N.E. 2d 601 (1978).

ciples. 125 L.Ed. 2d at 88. As the majority explained in *Harper*:

> "Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.* at 51-52, 110 L.Ed. 2d 17, 110 S.Ct. 2238. State law may provide relief beyond the demands of federal due process, *id.* at 52, n. 36, 110 L.Ed. 2d 17, 110 S.Ct. 2238, but under no circumstances may it confine petitioners to a lesser remedy, see, *id.*, at 44-51, 110 L.Ed. 2d 17, 110 S.Ct. 2238."

125 L.Ed. 2d at 89.

Although the Ohio Supreme Court in *Hyde, supra*, initially reviewed and applied *Chevron Oil Company v. Huson*, 404 U.S. 97, 30 L.Ed. 2d 296, 92 S.Ct. 349 (1971), the Court recognized that it was constrained to apply *Harper* in its analysis.[3] The Ohio court then applied *Harper*, and as *Harper* permits, fashioned the appropriate relief to be accorded to the citizens of Ohio. In so doing, the Ohio court harmonized the decision of *Bendix* with the requirements of the Ohio Constitution, § 16, Article I, explaining:

> "Our decision today does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows § 16, Article I of the Ohio Constitution and the com-

[3] In reviewing *Chevron*, the court indicated that it was unclear whether *Harper* was intended to replace *Chevron* or to supplement it. *Hyde, supra*, at 243. The Ohio Supreme Court then applied *Chevron* because this Court left open the issue of retroactivity where the issue was reserved by the Court. *Harper, supra*, at 125 L.Ed. 2d at 86-87. The question of retroactivity was reserved in *Bendix, supra*, at 100 L.Ed. 2d at 905. Upon applying the *Chevron* factors, the Ohio Supreme Court found that prospective application of the *Bendix* decision was mandated.

merce clause of the Federal Constitution to coexist." 68 Ohio St. 3d 245.

In fashioning its remedy, the Ohio Supreme Court provided for the protection of individual rights as consistently mandated by the United States Supreme Court decisions in *Chevron Oil Company v. Huson, supra, Harper v. Virginia Department of Taxation, supra,* and *James Beam Distilling Company v. Georgia,* 501 U.S. ——, 115 L.Ed. 2d 481, 111 S.Ct. 2439 (1991). This Court's decisions consistently provide that the doctrine of retroactivity may not be applied in such a way as to deprive litigants of their due process rights, as the principles of equality, fairness and *stare decisis* were furthered by the retroactive application of the decision in *James Beam, Chevron,* and *Harper.* In contrast, a retroactive application of the *Bendix* decision in this case that ignored the remedy directives of *Harper* would serve only to deprive Respondent of vested, accrued rights, and deprive her of the right to her day in court. The remedy fashioned by the Ohio court preserved the due process rights of the Respondent.

Thus, contrary to Petitioners' assertions, the Ohio Supreme Court *did* retroactively apply the *Bendix* decision, as required by *Harper.* The Court also fashioned a remedy pursuant to the state constitutional right to a remedy in compliance with *Harper,* thereby allowing both the constitutional right to a remedy and the commerce clause of the Federal Constitution to coexist.

The Ohio Supreme Court also noted the potential conflict between the state constitutional provision for a right to a remedy and this Court's rule of decision on retroactivity, noting:

> ". . . when there is a conflict between a state constitutional civil right and federal rule of decision that is not rooted in the United States Constitution such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245. This Court has held that decisions not involving federal questions are not binding upon state courts. *Provident Inst. v. Massachusetts* (1868), 6 Wall 611, 18 L.Ed. 907. Accordingly, states are free to follow or disregard principles which have evolved on the basis of decisional law not based upon any constitutional principle, so long as the state procedure remains consistent with due process of law. *Fletcher v. Weir,* 455 U.S. 603, 71 L.Ed. 2d 490, 102 S.Ct. 1309 (1982).

This Court's retroactivity doctrine is based upon the common law and federal rules of decision, but not the Constitution, as Justice Thomas, speaking on behalf of the majority, explained:

> "Both common law and our own decisions have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'" (Citations omitted.)

125 L.Ed. 2d at 84. Accordingly, as the Ohio Supreme Court recognized, litigants guaranteed a state constitutional right to a remedy should not be divested of that right due to a federal rule of decision not rooted in the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE DALKON SHIELD CLAIMANTS TRUST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION TO APPEAR AS *AMICUS*

The Dalkon Shield Claimants Trust ("Trust") respectfully reguests leave to appear as *amicus curiae* in this case.

Pursuant to Supreme Court Rule 37.2, the Trust has requested all parties to agree, in writing, to the Trust's participation as *amicus curiae*. Petitioner gave such consent (*see* Exh. A, attached) but Respondent refused (*see* Exh. B, attached). Respondent's counsel's refusal is based on: 1) his desire not "to make the matter any more complicated than it is"; and 2) his inability "to see where the filing of an Amicus brief . . . will assist the Court in rendering its decision." *See* Exh. B.

Both concerns are belied by the course of proceedings in the Ohio Supreme Court. Although the individual facts of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994), involve a traffic accident, three *amici curiae* filed briefs on behalf of the plaintiff (now Respondent) in the Ohio Supreme Court. Two of the *amici* were law firms that represent Dalkon Shield plaintiffs in Ohio, and the third was a state-wide organization of personal injury lawyers. Plaintiff's *amici* repeatedly informed the Ohio Supreme Court that this case has implications far beyond automobile accidents or the parties to the action, and particularly affects the claims of hundreds of Ohio residents allegedly injured by their use of a Dalkon Shield intrauterine device ("IUD").

The 16-page *amicus curiae* brief filed by Spangenberg, Shibley, Traci, Lancione & Liber purported to represent the interests of women who "currently [have] a claim pending against the Dalkon Shield Claimants Trust" and who "[a]t the time of filing . . . relied upon the case law of Ohio, which provided that the

statute of limitation did not provide a defense to defendant, A.H. Robins Company." *Amicus* articulated a concern that "[i]f *Bendix* is applied retroactively, as the Court of Appeals determined it should be, those women's claims may be extinguished, and their injuries may go uncompensated."

The 28-page brief filed by *amicus curiae* Brown & Szaller Co., L.P.A., further sought to present the Ohio Supreme Court with "the plight of a large group of its clients, residents of Ohio who relied on the provisions of the tolling statute." These residents were the "350 clients" of the law firm allegedly "injured by the Dalkon Shield IUD." The *amicus* brief claimed that "[a] significant portion of the Ohio residents who filed claims" in the Robins bankruptcy "relied on the provisions of the tolling statute . . . when they and their attorneys determined *when* to file legal claims against Robins in either state or federal court."

Finally, the Ohio Academy of Trial Lawyers filed its 44-page *amicus* brief on behalf of numerous plaintiffs, "including a multitude of Dalkon Shield litigants . . . ." "Compelled to interject" its "insights" into the appeal, the Association "urges this Court to carefully consider the issues presented herein and the impact of the resolution on these issues on pending and future litigation in Ohio."

The two Dalkon Shield law firm *amici* also filed *amicus* "reply briefs." In fact, counsel for plaintiff allowed counsel from the law firm of Brown & Szaller to present the "argument" portion of plaintiff's oral argument before the Ohio Supreme Court. Respondent's refusal now to consent to *amicus* participation is without sound basis.

In sum, this is not a case about two individuals in an automobile accident. The issues herein have much broader implication, and especially to Dalkon Shield Claimants and the Trust. Entities representing those interests present a unique and helpful perspective to this Court. Under the facts of this case, and given the unreasonableness of counsel for Respondent's withholding of consent, the Trust respectfully requests leave to file the attached proposed *amicus* brief in support of certiorari.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Can the Ohio Supreme Court continue to apply Ohio's "tolling statute" to claims and cases against out-of-state corporations, even though this Court held that statute to be unconstitutional in a 1988 decision and applied the 1988 decision to the parties before it?

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IN THE

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October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
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CAROL L. HYDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF THE DALKON SHIELD CLAIMANTS TRUST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTEREST OF THE *AMICUS*

This Brief is submitted on behalf of the Dalkon Shield Claimants Trust ("Trust"). The Trust was established to administer and distribute a limited fund to compensate users of the Dalkon Shield intrautrine device ("IUD") for injuries they claim to have suffered as a result of its use (hereafter "Dalkon Shield Claimants" or "Claimants"). The Trust has a compelling interest in the decision below, which deprives the Trust of its statute of limitations defense in Ohio. The effect of the Ohio Supreme Court's decision is to encourage litigation over the carefully crafted claims resolution procedures followed by the Trust. Those procedures provide fair and equitable compensation to Dalkon Shield Claimants with a mechanism which favors settlement over arbitration and litigation, thereby reducing transactional costs and preserving Trust assets for the benefit of deserving Claimants.

By refusing to acknowledge and apply controlling U.S. Supreme Court law, the Ohio Supreme Court has given Ohio's unconstitutional tolling statute new life. In so doing, the Ohio Court benefits Ohio Dalkon Shield Claimants to the detriment of Claimants in other states and encourages the depletion of Trust funds through litigation by Ohio Claimants. A brief background of the Trust will illustrate the adverse and discriminatory impact of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994).

A. The Dalkon Shield Claimants Trust and Claims Resolution Facility.

A.H. Robins, manufacturer of the Dalkon Shield IUD, filed for bankruptcy in 1985, on the heels of thousands of lawsuits filed by Dalkon Shield IUD users. During the pendency of that bankruptcy, some 197,000 Dalkon Shield Claimants filed claims. A plan of reorganization confirmed in 1988, and consummated in 1989, called for a unique approach to compensate as many of those Claimants as possible through a $2.23 billion fund administered by the Trust.

Four guidelines formulated by the Claims Resolution Facility ("CRF") drive every decision underlying the Trust's claims review process:

1. Provide an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs;

2. Provide Claimants with an attractive alternative to trial by jury where settlement is not achieved;

3. Provide fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield; and

4. Provide no compensation to persons not injured by the Dalkon Shield.

B. The Compensation Options for Dalkon Shield Claimants Across the Nation and in Ohio.

Consistent with the above guidelines, the CRF provides all Dalkon Shield Claimants with three[1] "options" for obtaining compensation. Option 1, chosen by 118,233 Claimants to date, provides a fixed payment for *de minimis* claims. Option 2, chosen by 15,258 Claimants to date, makes payment for more serious injury according to a schedule, without requiring proof of medical causation. Option 3, chosen by 42,732 Claimants to date, provides a detailed, individualized evaluation by the Trust of claims supported by medical records and evidence of medical causation, to produce an offer of compensation to the Claimant for all injuries caused by the Dalkon Shield. To date, over 80 percent of all Option 3 Claimants have had their claims reviewed. Of those, over 90 percent have accepted the proposed payment, resulting in total compensation payments of over $1.1 billion.

To encourage claims resolution over traditional litigation, the CRF prohibits the Trust from asserting certain defenses during the claims resolution phase under Options 1 and 2. For example, no claim under Options 1 or 2 is subject to a diminished value because of an actual or potential statute of limitations bar. Even under the Option 3 claims resolution process, the Trust has not asserted a statute of limitations defense. Further, a Claimant who is dissatisfied with the Option 3 offer, and who elects to resolve her claim through alternative dispute resolution ("ADR") procedure, may do so without being subjected to any statute of limitations

[1] A fourth "option" permits a Claimant to defer consideration of his or her claim without waiving any right to that claim.

defense. A separate alternative to litigation after rejection of an Option 3 offer is neutral arbitration, governed by a three-year statute of limitations. Finally, a Claimant who rejects her Option 3 offer and chooses traditional litigation is subject to all available Trust defenses, including the statute of limitations of the appropriate jurisdiction.

Two law firm *amici* representing Ohio Dalkon Shield Claimants filed briefs in the Ohio Supreme Court in the case below. The briefs urged the Court to reject retroactive application of *Bendix*, and thus eliminate the Trust's statute of limitations defense in Ohio. As was true of all Claimants nationwide, the Claimants represented by the law firm *amici* had numerous opportunities to obtain compensation, unfettered by Ohio's statute of limitations. Further, all Option 3 evaluations for these Claimants occurred long after the United States Court of Appeals for the Sixth Circuit and this Court ruled that Ohio's tolling statute was unconstitutional. The sole purpose of the law firm *amici* briefs was to obtain hindsight justification from the Ohio Supreme Court for the Claimants' rejection of the Trust's claims resolution process.

II. REASONS FOR ALLOWANCE OF WRIT AND SUMMARY REVERSAL

In his dissent to *Hyde v. Reynoldsville Casket Co.*, Justice Craig Wright of the Ohio Supreme Court, joined by Chief Justice Thomas Moyer, wrote:

> The court in *Bendix* [*Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988)] ruled that Ohio has no power, under the Commerce Clause, to toll its statute of limitations against out-of-state entities. The Ohio Constitution cannot be used, as a majority does today, to revive this unconstitutional statute, that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. *In a word, should the Supreme Court grant review we invite peremptory reversal.*

See Appendix to Petition for Writ of Certiorari ("Pet. App.") at A16 (emphasis supplied). Justice Wright was right. Supreme Court Rule 16.1[2] permits a summary disposition on the merits when, as here, a decision is both clearly erroneous, and contrary to controlling Supreme Court precedent. Such a "peremptory reversal" should be entered in this case.

The Ohio Supreme Court cited to—but misconstrued—the controlling U.S. Supreme Court authority on the issue of retroactivity, *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). Confirming the earlier decision of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), *Harper* held:

> When this Court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full

[2] "After consideration of the papers distributed pursuant to Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits."

> retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule.

Harper, 113 S.Ct. at 2517. The Ohio Supreme Court majority held that notwithstanding this unambiguous rule, it had the power to fashion a "remedy" for those plaintiffs whose suits are barred by the retroactive application of *Bendix*. That "remedy" was prospective application of *Bendix*. Such circular logic is invalid on its face and susceptible to a summary reversal.

A. This Court Did Not "Reserve" the Issue of Retroactive Application in *Bendix*.

The Ohio Supreme Court majority first assumed that because this Court "specifically declined to determine" whether its ruling in *Bendix Autolite Corp. v. Midwesco Enterprises,* 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988), "should be applied prospectively only," it was up to the Ohio Court to take on "the task of determining whether the *Bendix* decision is to be applied retroactively." Pet. App. at A4. The Ohio Court misperceived its task. Because this Court applied the rule of *Bendix* to the parties before it, the retroactivity decision has already been made.

In *Bendix*, this Court refused to consider petitioner's argument that its ruling should be applied prospectively only, because petitioner had failed to preserve the issue. This Court then applied its ruling to the parties before it by affirming the decision of the Sixth Circuit, which in turn affirmed the District Court's grant of summary judgment in favor of the out-of-state defendant manufacturer. Thus, plaintiff's claims were barred by the statute of limitations and Ohio's tolling statute would not apply to save those claims.

As this Court unequivocally held in *Harper*, the question of retroactive application does not remain open unless a court reserves the question of "whether its holding should be applied *to the parties before it.*" *Harper,* 113 S.Ct. at 2518 (emphasis supplied), *quoting Beam, supra,* 111 S.Ct. at 2445. This Court did not reserve the question of whether its holding should be applied to the parties before it in *Bendix*—it applied its holding to the parties before it. Therefore, under *Harper, Bendix* must be applied retroactively to all cases, regardless of whether the events of those cases pre-date the announcement of the rule:

> When this Court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule.

Harper, 113 S.Ct. at 2517.

B. Even If The Issue of Retroactivity Were "Reserved," the Ohio Supreme Court Erred by Unilaterally Reviving and Applying the Doctrine of "Selective Prospectivity" to a Decision of this Court.

Having erroneously concluded that this Court "reserved" the issue of retroactive application in *Bendix*, the Ohio Supreme Court performed a perfunctory analysis of the factors set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) and concluded that *Bendix* must apply prospectively only. Pet. App. at A5-A6. Since the rule of *Bendix* was applied to the parties in *Bendix*, the effect of the Ohio Supreme Court decision was to reinstate the discredited doctrine of selective prospectivity.

The doctrine of "selective" or "modified" prospectivity provides that the court can apply a new rule to the parties before it, "then return to the old one with respect to others arising on facts predating the pronouncement." *Beam, supra*, 111 S.Ct. at 2444. This Court noted in *Beam* that selective prospectivity was abandoned in the criminal context in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and "appears never to have been endorsed in the civil context." *Id.* at 2445.

In *Harper*, this Court removed any doubt as to whether the doctrine has any continued validity. This Court explicitly extended "*Griffith's* ban against 'selective application of new rules' " to all civil cases. *Harper, supra*, 113 S.Ct. at 2517 (cites omitted). Such "selective temporal barriers," this Court held, would lead to the impermissible "shift and spring" of substantive law in response to individual equities. *Id.*

Because "selective prospectivity" is prohibited, the *Chevron* factors have no application to a case where the rule to be applied was applied to the parties before the court at the time the rule was formulated. *Harper, supra*, 113 S.Ct. at 2517. Those cases *must* be applied retroactively. *See, e.g., Landgraf v. USI Film Products*, 62 U.S.L.W. 4255, 114 S.Ct. 1483, 1504 n. 32, 128 L.Ed.2d 229 (1994) (although this Court's doctrine of judicial retroactivity "involved a substantial measure of discretion, guided by equitable principles" in 1974, when *Chevron* was controlling, *Harper* "established a firm rule of retroactivity").

The Ohio Supreme Court nevertheless relied on *Chevron* to hold that Ohio's tolling statute was unconstitutional as applied to the manufacturer in *Bendix*, but not as to other out-of-state manufacturers that allegedly committed torts in Ohio prior to the

Bendix decision. This decision is so clearly erroneous and contrary to established precedent as to invite summary reversal. *See, e.g., El Vocero de Puerto Rico v. Puerto Rico*, 61 U.S.L.W. 3769, 113 S.Ct. 2004, 2006, 124 L.Ed.2d 60 (1993) (granting certiorari and summarily reversing the Puerto Rico Supreme Court's refusal to apply a U.S. Supreme Court decision to a pending case); *Truesdale v. Aiken, Warden*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (summary reversal of South Carolina Supreme Court's refusal to apply U.S. Supreme Court decision retroactively).

C. A State Supreme Court Cannot Revive a State Statute this Court Has Declared to be Unconstitutional by Adopting Selective Prospectivity as a "Remedy."

The second half of the Ohio Supreme Court majority opinion recognizes that *Harper* requires retroactive application of *Bendix*, but then misreads *Harper* as "allow[ing] state courts to tailor their own remedies as they determine the *manner* in which a supreme court opinion is to be retroactively applied." Pet. App. at A7 (emphasis supplied). The "manner" the Ohio Supreme Court chooses in applying *Bendix* retroactively is outright refusal to apply *Bendix* retroactively.

Contrary to the majority opinion in *Hyde*, the brief discussion of "remedy" in *Harper* is completely irrelevant to this case. The issue at those pages of this Court's decision was not the retroactive application of judicial decisions, but the constitutional duty placed upon states to provide either a prospective or retrospective relief mechanism for taxpayers who have been subjected to an unlawful tax.

A comprehensive analysis of the "remedy" issue is set forth in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d

17 (1989). There, this Court establishes a constitutional framework within which states must provide procedural safeguards against an unlawful tax exaction. Such procedural safeguards may be in the form of a pre-deprivation hearing (*i.e.*, a method of protesting the tax without paying it) or in a refund of unlawfully paid taxes. The Due Process Clause of the Fourteenth Amendment prohibits states, however, from requiring taxpayers to pay a tax before challenging it—thus denying them of property without any pre-deprivation hearing—and refusing refunds after a successful challenge.

This case does not involve pre-deprivation or post-deprivation hearings in tax cases. This is a tort action in which the defendant raised the statute of limitations as a defense. The trial court granted a motion to dismiss on that basis and the Court of Appeals affirmed. Plaintiff's cause of action was time barred and it could not be "saved" by an unconstitutional statute. No "liability" has been adjudged and no "remedy" is appropriate. Plaintiff has been deprived of no property by state enforcement of an unlawful statute. To the contrary, plaintiff simply cannot maintain an untimely lawsuit based on a "tolling" statute that violates the Commerce Clause of the United States Constitution.

In fact, the Ohio Supreme Court majority's "remedy"—apply the tolling statute to all claims that accrued prior to this Court's decision in *Bendix*—completely swallows the doctrine of retroactivity. The "remedy" is no more and no less than one state's refusal to apply *Bendix* retroactively. According to this theory, even an explicit mandate from this Court that *Bendix* applies retroactively would have no effect. The Ohio Supreme Court could simply "tailor a remedy" that allowed it to apply retroactivity in a prospective "manner."

D. Ohio's Invocation of Its Constitution to Refuse Retroactive Application of *Bendix* Violates the Supremacy Clause of the United States Constitution.

Finally, the Ohio Supreme Court majority in *Hyde* drew upon its own decisions striking down Ohio statutes of repose to justify its refusal to apply *Bendix* retroactively. Specifically, the Court relied on the "open courts" provision of Article I, Section 16 of the Ohio Constitution to find a "conflict" between the Ohio Constitution and the federal "decisional rule" of retroactivity. Pet. App. at A8. The majority concluded that because the retroactive application of *Bendix* would have the effect of barring an action timely at the time it was filed, retroactive application must fall before the prevailing Ohio Constitution. *Id.*

Article VI, Clause 2 of the United States Constitution provides that all laws of the United States made pursuant to the United States Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Pet. App. at A36. The Ohio Supreme Court majority surmised that retroactivity is simply a "court-created doctrine of uniformity" that is not the supreme law of the land. Pet. App. at A9. The Ohio Court misconstrued the nature of the doctrine of retroactivity.

Retroactive application of a federal decision is a federal interpretation of federal law. Federal interpretations of federal law are just as binding on state courts as federal law. As this Court held in *Harper*:

> The Supremacy Clause, U.S. Const. Art. VI, Cl. 2, does not allow federal retroactivity doctrines to be supplanted by the invocation of a contrary approach

> to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretation of federal law.

Harper, 113 S.Ct. at 2519. The Ohio Supreme Court majority's "manner" of applying a retroactive decision prospectively cannot supplant federal retroactivity.

Similarly misguided is the majority's conclusion that the doctrine of retroactivity "is not rooted in the United States Constitution." Pet. App. at A9. *Bendix* is firmly rooted in the Commerce Clause of the United States Constitution. The application of a federal rule or decision cannot be divorced from the substance of the decision. The Ohio Supreme Court's continued enforcement of the unconstitutional Ohio tolling statute under the guise of "prospective application" is a violation of the United States Constitution. What the Ohio Supreme Court has done, in effect, is revive Ohio's tolling statute for all Ohio plaintiffs whose claims accrued prior to the *Bendix* decision—except the plaintiff in *Bendix*.

Finally, to the extent that the Ohio Supreme Court has held that its "open courts" constitutional provisions can prevail over the Commerce Clause of the United States Constitution, it is in error. *See, Reynolds v. Simms*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls"). The majority's discussion of Ohio law is simply an effort to reintroduce the tolling statute through a back door. *Compare Chevron Oil Co. v. Huson, supra*, 404 U.S. at 103-04 (1971) (federal common law could not be invoked to "reintroduce the doctrine [of laches] through the back door"). The confusion of the majority opinion, exposed in the dissent, should be summarily corrected.

E. Conclusion.

The bright line rule of retroactivity this Court established in *Beam*, and clarified in *Harper*, enhances uniformity and predictability in the application of United States Supreme Court decisions. The consistency thus engendered is particularly important in today's legal environment of burgeoning national litigation, where manufacturers of a product are likely to find themselves sued in 50 different states.

Equities also favor a bright line rule of retroactivity, as demonstrated by this case. No state other than Ohio has continued to enforce an unconstitutional tolling statute in the face of *Bendix*. *Compare Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990); *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir.), *cert denied*, 498 U.S. 896 (1990); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064 (8th Cir. 1992).[3] No Dalkon Shield Claimants other than Ohio Claimants can burden the limited Trust resources with litigation, free from the restraints imposed by a state statute of limitations.

Ohio alone—the state that precipitated the tolling statute struck down in *Bendix*—has refused to recognize this Court's retroactive application of *Bendix*. Instead, it has created its own rule of retroactivity—the prohibited doctrine of "selective" prospectivity. As a result, Ohio Dalkon Shield Claimants, unlike the Claimants of any other state, may invoke an unconstitutional statute, reject all fair and final offers of compensation from the Trust, and deplete Trust funds through traditional litigation.

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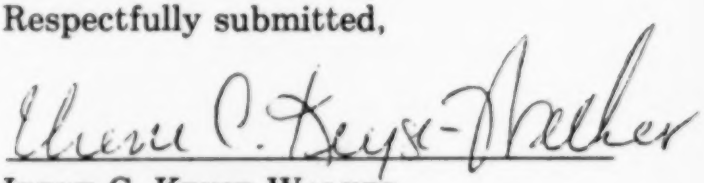
[3] Prior to the *Hyde* decision, Ohio state and federal courts applied *Bendix* retroactively. *See, e.g., Tesar v. Hallas*, 738 F. Supp. 240 (N.D. Ohio 1990); *Gray v. Osten*, 75 Ohio App. 3d 96, 598 N.E.2d 893 (1992).

The decision of the Ohio Supreme Court is so palpably wrong—and unfair—that further briefing and oral argument would simply be a waste of this Court's resources. The Trust therefore respectfully requests that this Court summarily accept certiorari, vacate the decision below, and enter judgment in favor of the petitioner, pursuant to Supreme Court Rule 16.1.

Respectfully submitted,



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M. H. Young (1910-1971)

July 26, 1994

Irene Keyes Walker, Esq.
ARTER & HADDEN
1100 Huntington Building
Cleveland, OH 44115-1475

Re: Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent
United States Supreme Court Case No. 94-3

Dear Ms. Keyes Walker:

This will confirm Reynoldsville Casket Co., petitioner, hereby consents to the Dalkon Shield Trust's appearance as amicus curiae in the captioned case.

Very truly yours,

William E. Riedel

WER:djk

Eardley & Zulandt

Attorneys and Counsellors at Law
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July 25, 1994

Irene C. Keyse-Walker
Arter & Hadden
1100 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1475

Re: Reynoldsville Casket Company v. Carol Hyde
U.S. Supreme Court No. 94-3

Dear Ms. Keyse-Walker:

This will acknowledge receipt of your fax regarding the above-mentioned matter.

Sometime ago, you contacted me as attorney for Carol Hyde, the Respondent in the above-captioned case, seeking my consent to file an Amicus brief on behalf of the Dalkon Shield Claimants Trust. I informed you then, as now, that I did not want to make the matter any more complicated or serious than it is. After ten years of frustration in waiting for all the appeals and judicial procedures, I simply want my client to have her day in Court.

I fail to see where the filing of an Amicus brief as proposed in your request will assist the Court in rendering its decision.

You informed me that the Supreme Court has requested that I put into writing my basis for objectioning to your filing an Amicus brief in this matter. In accordance therewith, this letter shall constitute my response.

Sincerely,

EARDLEY & ZULANDT

David J. Eardley

David J. Eardley

DJE:smf

No. 94-3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

v.

CAROL L. HYDE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Supreme Court of the United States
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No. 94-3

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,
v.
CAROL L. HYDE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

I. THE AMICUS CURIAE MOTION FOR LEAVE AND BRIEF ARE UNTIMELY, AND SHOULD NOT BE CONSIDERED BY THIS COURT.

The amicus curiae motion and brief filed on behalf of the Dalkon Shield Claimants Trust ("Trust") is untimely, and should not be considered by this Court. The Petition for Writ of Certiorari was filed on behalf of the Petitioner on July 1, 1994. The Memorandum in Opposition to the Petition For Writ of Certiorari was due to be filed on July 31, 1994. The brief in opposition was filed by Respondent on July 28, 1994. The Trust filed its motion and brief on August 3, 1994.

Supreme Court Rule of Practice 37.4 provides in part as follows:

> . . . A motion will not be received unless submitted within the time allowed for the filing of an amicus brief on written consent. . . .

Supreme Court Rule of Practice 37.2 provides in part as follows:

> A brief of an amicus curiae submitted prior to the consideration of a petition for a writ of certiorari or a jurisdictional statement accompanied by the written consent of all parties may be filed only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari or filing a motion to dismiss or affirm. . . .

The Trust had until July 31, 1994 in which to file its brief.

Since the amicus curiae brief was not filed in a timely manner consistent with Supreme Court Rule of Practice 37, the Court should not consider the motion or brief.

II. THE TRUST HAS MISSTATED MATERIAL FACTS IN ITS BRIEF.

Even though the amicus brief is untimely, Respondent nonetheless feels compelled to briefly address the allegations in the Trust's brief. The Trust was established ". . . to assume any and all liabilities of Robins . . . and to satisfy . . . all Dalkon Shield personal injury claims . . ." (Claimants Trust Agreement, CTR-1, Plan Exhibit A to Robins Sixth Amended and Restated Plan of Reorganization [Plan]). In practical terms it wears two hats, and therefore is akin to an insurance company by reviewing and setting claims while it is also the defendant in litigation brought by Dalkon Shield victims who reject settlement offers.

When it is the defendant, the Trust uses available limitation defenses against only the most injured, women who seek more than $20,000.00 in damages. Statutes of limitation are not considered by the Trust when making offers of settlement; are not raised in arbitrations in which the victim seeks $20,000.00 or less in damages; but are raised when the claimant has a serious injury, pursues litigation and seeks compensation in excess of $20,000.00.

The Trust correctly notes that because of *Hyde v. Reynoldsville Casket Company* (1994), 68 Ohio St. 3d 240, 626 N.E. 2d 75, it cannot now raise the statute in Ohio as a defense, but fails to mention that when the Ohio Dalkon Shield victims filed claims, they were *timely,* and *not* barred by any statute. The tolling statute they relied upon when many of them filed timely claims was not held unconstitutional in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 100 L.Ed. 896, 108 S.Ct. 2218 (1988), until *after* they filed claims. *Hyde* simply confirmed their vested right to proceed to litigation against Robins' liability successor.

The Trust suggests *Hyde* will ". . . [benefit] Ohio Dalkon Shield claimants to the detriment of claimants in other states and [encourage] the depletion of Trust funds through litigation by Ohio claimants . . .". Amicus brief at 1. Respondent Carol Hyde disagrees for three reasons.

First, concerned that, (1) the Trust was raising statutes of limitation defenses only against the most injured, and (2) that in some states statutes of limitations were not available as a defense to the Trust, a number of state legislatures have recently passed legislation prohibiting the Trust from raising the statutes as a defense. (See, the statutes of New York, Kansas and California, attached hereto as Appendix, pp. 1a-5a.) Therefore, *Hyde,* rather than being a "detriment" to claimants in other states, simply puts Ohio Dalkon Shield on an equal footing with them.

Second, as a practical matter, the fact that an Ohio Dalkon Shield victim may still proceed to trial and not be faced with a statute of limitation defense is not justification for pursuing litigation. Access to the court

certainly does not guarantee a judgment. The victim must still argue and prove her cause.

Third, approximately two-thirds of the corpus of the Trust remains, while the vast majority of claims (estimated at 80%) have been resolved. There is, therefore, no chance that the considerably less than 100 Ohio Dalkon Shield victims who claim serious injury in litigation will deplete, or even impact, the approximate $1.5 billion dollars remaining in the fund for the victims.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests this Court not consider the motion and brief of the Amicus Curiae.

Respectfully submitted,

DAVID J. EARDLEY
Counsel of Record
114 East Park Street
Chardon, Ohio 44024
(216) 286-6177
Counsel for Respondent,
Carol L. Hyde

APPENDIX

APPENDIX

Revival of Causes of Action for Effects of Silicone Breast Implants or DALKON Shields. L.1993, c. 419, § 1, eff. July 21, 1993, provided:

"Every cause of action for personal injury or death caused by the effects of silicone gel injected or implanted within the body, or caused by the effects of a silicone breast implant or its component parts implanted within the body, or caused by the effects of a DALKON shield intrauterine device inserted or implanted within the body, which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired, is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act or in the case of an action caused by the effects of a DALKON shield intrauterine device an action by a claimant of the DALKON Shield Claimants Trust may be commenced within one year of certification to proceed with litigation provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which has not been barred as of the date of the decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trusts law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required. Any action pursuant to this section commenced prior to the effective date of this act shall not be dismissed based upon any period of limitations.

"This section shall not be applicable to any action for medical malpractice."

McKinney's Public Health Law § 2404

SENATE BILL No. 607

AN ACT concerning civil procedure and civil actions; relating to limitation of civil actions related to Dalkon Shield victims.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Except as provided in subsection (c), notwithstanding any other limitation contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action, except an action for relief on the ground of fraud, brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall be brought in accordance with procedures established by the A.H. Robins company, inc. plan of reorganization, and shall be brought within 10 years of the time in which such cause of action shall have accrued.

(b) Any civil action for relief on the ground of fraud brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall not be deemed to have accrued until the fraud of A.H. Robins company, inc. was discovered, without regard to the date of any physical injury occurred.

(c) The provisions of this act shall not affect any applicable statute of repose as otherwise provided by law.

(d) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

_____

SENATE adopted
Conference Committee Report _____

_____
President of the Senate.

_____
Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

APPROVED _____

_____
Governor.

California Legislature—1993-94 Regular Session

ASSEMBLY BILL No. 2855

Introduced by Assembly Members Archie-Hudson, Bronshvag, Barbara Friedman, Terry Friedman, Lee, Martinez, Moore, O'Connell, and Speier

(Coauthors: Senators Killea, McCorquodale, Torres, and Watson)

February 17, 1994

An act to add Section 340.7 to the Code of Civil Procedure, relating to limitation of actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 2855, as introduced, Archie-Hudson. Limitation of actions.

Existing law sets the statute of limitations applicable to actions of injury or death caused by the wrongful act or neglect of another at one year.

This bill would enact an exception thereto with respect to certain actions against the Dalkon Shield Claimants' Trust, as specified, extending the statute of limitation to 15 years, tolling such actions as specified, and providing that these provisions apply to actions which have lapsed.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 340.7 is added to the Code of Civil Procedure, to read:

340.7. Notwithstanding subdivision (3) of Section 340, any civil action brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield Claimants' Trust, shall be brought in accordance with the procedures established by A. H. Robins Company, Inc. Plan of Reorganization, and shall be brought within 15 years of the date on which the victim's injury occurred, except that the statute shall be tolled from August 21, 1985, the date on which the A. H. Robins Company filed for Chapter 11 Reorganization in Richmond, Virginia.

This section applies regardless of when any such action or claim shall have accrued or been filed and regardless of whether it might have lapsed otherwise be barred by time under California law.

(5)

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

AMICUS CURIAE THE DALKON SHIELD CLAIMANTS TRUST'S ANSWER TO RESPONDENT'S OPPOSITION TO MOTION TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BATAVIA TIMES PRINTING, INC.—TELEPHONE (716) 344-2000

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No. 94-3

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AMICUS CURIAE THE DALKON SHIELD CLAIMANTS TRUST'S ANSWER TO RESPONDENT'S OPPOSITION TO MOTION TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Dalkon Shield Claimants Trust ("the Trust"), filed its Motion for Leave to file an *Amicus Curiae* Brief and Brief in Support of Petition for Writ of Certiorari in this matter on August 3, 1994 (hereinafter "motion and *amicus* brief"). On August 25, 1994, Respondent filed a document entitled "Respondent's Supplemental Brief in Response to Motion for Leave to File *Amicus Curiae* Brief." In her "Supplemental Brief," Respondent erroneously suggests that the Trust's motion and *amicus* brief were not timely filed.

The Trust's counsel was not served with Respondent's "Supplemental Brief," and would not have known of its existence but for a routine call to the clerk's office on September 9, 1994, to inquire into the status of the case. Counsel immediately requested a copy of the Supplemental Brief from Respondent's counsel, and received it on September 12, 1994. Because the Supplemental Brief includes inaccurate facts and argument regarding the timeliness of the Trust's motion and *amicus* brief, a brief Answer is necessary.

I. THE TRUST'S MOTION AND *AMICUS* BRIEF WERE TIMELY

The Ohio Supreme Court decision for which review is sought was finalized April 6, 1994, making the Petition for Writ of Certiorari due July 5, 1994. According to the U.S. Supreme Court clerk's office, that Petition was filed on June 30, 1994. Respondent claims in her Supplemental Brief that it was filed July 1, 1994. Either way, the Trust's August 3 motion and *amicus* brief were timely.

Supreme Court Rules of Practice 37.2 and 37.4, read in conjunction. provide that a party wishing to file for leave to appear as *amicus* on behalf of the petitioner

shall file a motion for leave and *amicus* brief "within the time allowed for filing a brief in opposition to the petition for certiorari . . . ." Respondent errs, however, in asserting that the Trust's motion and *amicus* brief were therefore due July 31, 1994.[1]

Although not mentioned by Respondent, the Rule governing the time for filing a brief in opposition to the petition for writ of certiorari is Supreme Court Rule of Practice 15.2. That Rule provides, in pertinent part:

> The respondent shall have 30 days . . . *after receipt* of a petition within which to file 40 printed copies of an opposing brief . . . .

(Emphasis supplied). June 30, 1994, was the Thursday before the July 4 weekend. There was only one business day—Friday, July 1—between June 30 and Tuesday, July 5. Given the normal three days required for service by first class mail (*see, e.g.*, Fed. Civ. R. Pro. 6(e) and Fed. R. App. Pro. 26(c)), Respondent presumably did not receive the petition until July 5, 1994, at the earliest. The opposing brief, and motion and *amicus* brief, were therefore due August 4, 1994, at the earliest. The Trust's motion and *amicus* brief were filed August 3, 1994, one day before they were due.

II. IF NECESSARY, LEAVE TO FILE OUT OF TIME SHOULD BE GRANTED

Respondent's timeliness arguments are based on erroneous filing dates, Sunday due dates, and a misstatement of the applicable rules. Her Supplemental Brief should be rejected. But even if Respondent's arguments are accepted, this Court could, and should,

[1] Since July 31 falls on a Sunday, it could not possibly be the due date. The Trust assumes that Respondent intended to argue that the due date was August 1.

consider the Trust's motion and *amicus* brief. *See, e.g., American Foreign Service Ass'n. v. Garfinkel*, 489 U.S. 1050, 109 S.Ct. 1307, 103 L.Ed.2d 577 (1989); *Booth v. Maryland*, 479 U.S. 1081, 107 S.Ct. 1280, 94 L.Ed.2d 139 (1987); *Intl. Union, UAW v. Brock*, 475 U.S. 1093, 106 S.Ct. 1487, 89 L.E.2d 890 (1986); and *Goldstein v. California*, 414 U.S. 883, 94 S.Ct. 27, 38 L.Ed.2d 131 (1973), all granting motions to file *amicus* briefs out of time for good cause shown.

Good cause exists because the Trust's interpretation of the Supreme Court Rules of Practice was clearly reasonable. The time for filing a motion and *amicus* brief does not begin to run until Respondent's "receipt" of a petition, and there was only one business day between June 30, 1994, and July 5, 1994. Using three days for first class mail service, the Trust reasonably calculated Respondent's "receipt" of the petition as occurring on July 5, making the motion and *amicus* brief timely when filed August 3.

Further, Respondent cannot claim she was surprised or prejudiced by the motion and *amicus* brief, since: 1) Dalkon Shield plaintiffs participated as *amici* in the Ohio Supreme Court; 2) the Trust participated as *amicus* in the Ohio Supreme Court; and 3) the Trust had requested consent to appear as *amicus* in this Court (*see* July 25, 1994 letter attached as Exh. B to the Trust's motion and *amicus* brief, where Respondent refused to consent).

Finally, good cause exists because this Court encourages the filing of any *amicus* brief "which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties . . . ." Supreme Court Rule of Practice 37.1. The Trust's *amicus* brief is the only brief arguing, with supporting authority, for a summary reversal of the clearly

erroneous Ohio Supreme Court decision in this case. It therefore brings relevant matter to this Court's attention.[2]

Because the Trust's motion and *amicus* brief were filed within the times provided by the Supreme Court Rules of Practice, Respondent's opposition to leave is without basis. In the alternative, the Trust respectfully moves for leave to file its motion and *amicus* brief out of time, for good cause shown.

Respectfully submitted,

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Attorneys for Amicus Curiae
The Dalkon Shield Claimants Trust

[2] Respondent's opposition also errs in its recitation of alleged "misstated material facts." However, since those errors have no relevance to the Trust's motion and *amicus* brief, they will not be addressed in this Answer.

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

JOINT APPENDIX

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November 15, 1994

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PETITION FOR CERTIORARI FILED JUNE 30, 1994
CERTIORARI GRANTED OCTOBER 7, 1994

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JOINT APPENDIX

Civil No. 85710

ASHTABULA COUNTY COURT
OF COMMON PLEAS

CAROL L. HYDE,
Plaintiff,

vs.

REYNOLDSVILLE CASKET CO.
AND JOHN M. BLOSH,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	*PROCEEDINGS*
8-11-87	Filed Plaintiff's complaint for bodily injury
10-13-87	Filed Defendants' Answer
2-8-88	Filed by Defendants—Motion to Dismiss
3-7-88	Filed by Plaintiff—Brief Contra Defendants Motion to Dismiss
9-22-88	Filed by Defendants—Supplemental Brief of Law in Support of Motion for Summary Judgment
10-12-88	Filed by Plaintiff—Supplemental Brief in Opposition to Motion to Dismiss

11-3-88	Filed by Defendants—Supplemental Brief of Law in Support of Motion for Summary Judgment
11-25-88	Filed by Plaintiff—Reply to Defendants' Supplemental Brief of Law
7-12-89	Filed by Plaintiff—Supplemental Brief in Opposition to Motion to Dismiss
7-31-91	NOTICE of Motion to Dismiss Complaint sustained
8-19-91	NOTICE OF APPEAL BY PLAINTIFF CAROL L. HYDE AS TO ORDER ENTERED 7-31-91

Case No. 91-A-1660

COURT OF APPEALS OF
ASHTABULA COUNTY, OHIO
ELEVENTH DISTRICT

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO.
AND JOHN M. BLOSH,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

DATE	*PROCEEDINGS*
9-19-91	Accelerated calendar scheduling notice filed
10-28-91	Filed Brief (Assignment of Errors) for Plaintiff-Appellant (Carol L. Hyde)
11-27-91	Filed Brief for Defendants-Appellees (Reynoldsville Casket Co. and John M. Blosh)
7-2-92	FILED OPINION AND JUDGMENT ENTRY: AFFIRMED
7-24-92	NOTICE OF APPEAL BY PLAINTIFF-APPELLANT AS TO OPINION ENTERED 7-2-92
11-23-92	JUDGMENT ENTRY—Motion and appeal allowed

Case No. 92-1682

THE SUPREME COURT OF OHIO

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO.
AND JOHN M. BLOSH,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

DATE	*PROCEEDINGS*
8-21-92	Filed by Plaintiff-Appellant—Memorandum in Support of Jurisdiction
9-22-92	Filed by Defendants-Appellees—Memorandum in Opposition to Jurisdiction
11-18-92	JUDGMENT ENTRY—Motion and appeal allowed
1-6-93	Filed by Plaintiff-Appellant—Brief on Merits
1-6-93	Filed Brief of Amicus Curiae Brown & Szaller Co., L.P.A.
1-7-93	Filed Brief of Amicus Curiae of Spangenberg, Shibley, Tracey, Lancione & Liber

3-9-93	Filed Reply Brief of Spangenberg, Shibley, Tracey, Lancione & Liber
3-10-93	Filed by Defendants-Appellants—Reply Brief
3-10-93	Filed Reply Brief of Amicus Curiae Brown & Szaller Co., L.P.A.
4-30-93	Filed Brief of Amicus Curiae of Ohio Academy of Trial Lawyers
9-24-93	Filed Amicus Curiae Brief of Dalkon Shield Claimants Trust
2-9-94	Filed JUDGMENT ENTRY AND OPINION: REVERSED AND REMANDED
2-18-94	Filed by Defendants-Appellees—Motion for Rehearing
2-25-94	REHEARING ENTRY: DENIED
3-4-94	Filed by Plaintiff-Appellant—Memorandum Opposing Appellees' Motion for Rehearing Instanter
4-6-94	Mandate issued
6-30-94	Filed by Defendants-Appellees—Petition for Writ of Certiorari to the United States Supreme Court

COMPLAINT AND JURY DEMAND

(Filed August 11, 1987)

CASE NO. 85710

JUDGE CARDINAL

[1] IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
R.D. 2,
Albion, PA 16401,
Plaintiff,

vs.

REYNOLDSVILLE CASKET CO.,
P.O. Box 68,
Reynoldsville, PA 15857,

and

John M. Blosh,
R.D. 1,
Reynoldsville, PA 15857,
Defendants.

COMPLAINT AND JURY DEMAND

FIRST CLAIM

1. On March 5, 1984, the plaintiff was a passenger in a motor vehicle (hereinafter "plaintiff's vehicle") proceeding south on State Route 193 in the Township of Denmark, County of Ashtabula, State of Ohio.

2. As plaintiff's vehicle approached the intersection with State Route 167, a vehicle driven by defendant John Blosh (hereinafter "Blosh") and owned by defendant Reynoldsville Casket Co., (hereinafter "The Casket Co."), pulled out of Route 167 in front of the plaintiff's vehicle.

3. Plaintiff's vehicle had the right of way at that intersection.

4. Blosh, by pulling out in front of the plaintiff's vehicle, was negligently failing to yield the right of way to the [2] plaintiff's vehicle.

5. As a result of Blosh's negligence, a collision occured between plaintiff's vehicle and the vehicle driven by Blosh.

6. As a result of said collision, plaintiff experienced personal injuries, including but not limited to multiple trauma, fractured left ribs, left pneumo-thorax, cardiac contusion, fractured left arm with nerve damage and a fractured left foot.

7. As a result of said collision, plaintiff experienced considerable pain and suffering.

8. As a result of said collision, plaintiff lost considerable time from work.

9. As a result of said collision, plaintiff experienced considerable financial loss in the form of doctor, hospital, and other medical expenses.

10. As a result of said collision, plaintiff has experienced and will continue to experience disability and loss of function of the left arm, which may be permanent.

11. As a result of Blosh's negligence, plaintiff was damaged in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00).

SECOND CLAIM

12. Plaintiff does hereby incorporate by reference as if fully rewritten herein the allegations made in paragraphs One through Eleven, inclusive of this Complaint.

[3] 13. At the time of the collision, Blosh was an employee of the Casket Co.

14. Blosh's actions herein were in the scope and course of his employment with the Casket Co.

15. The Casket Co. is liable for the damages caused by the negligence of Blosh in the collision herein.

16. The Casket Co. is liable to plaintiff in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Wherefore, the plaintiff CAROL HYDE demands judgment against defendants JOHN M. BLOSH and THE REYNOLDSVILLE CASKET COMPANY, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00) plus interest thereon at the legal rate, plus the costs of this action.

/s/ DAVID J. EARDLEY
Attorney for Plaintiff
114 East Park Street
Chardon, Ohio 44024
(216) 286-6177 or 942-7718

/s/ RICHARD C. WOOLLAMS, JR.,
Attorney for Plaintiff
114 East Park Street
Chardon, Ohio 44024
(216) 286-6177

[4] *JURY TRIAL*

Plaintiff hereby demands a trial by jury herein.

/s/ DAVID J. EARDLEY,
Attorney for Plaintiff

/s/ RICHARD C. WOOLLAMS, JR.,
Attorney for Plaintiff

ANSWER

(Filed October 13, 1987)

CASE NUMBER 85710
(Judge Cardinal)

ASHTABULA COUNTY
COURT OF COMMON PLEAS
JEFFERSON, OHIO

CAROL L. HYDE,
Plaintiff,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants.

ANSWER

(Jury Demand Endorsed Hereon)

Now come the defendants, Reynoldsville Casket Co. and John M. Blosh, by and through counsel, having first obtained leave of Court to file a responsive pleading, and for their

FIRST DEFENSE

FIRST CLAIM

1. Defendants admit the allegations contained in paragraph one (1) of the Complaint.

2. Defendants deny the allegations contained in paragraphs two (2), three (3), and four (4) of the Complaint.

3. Defendants admit that an automobile accident occurred involving motor vehicles operated by the plaintiff and John M. Blosh on March 5, 1984, but deny the remaining allegations contained in paragraph five (5) of the Complaint.

4. Defendants deny the allegations contained in paragraphs six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11) of the Complaint.

SECOND CLAIM

5. In answer to paragraph twelve (12) of the Complaint, defendants reallege their answer to the First Claim.

6. Defendants admit the allegations contained in paragraph thirteen (13) of the Complaint.

7. Defendants cannot respond to the allegations and averments set forth in paragraph fourteen (14) of the Complaint in that said allegations and averments are forked, conclusory, and assume facts not in evidence, which facts would be inferentially admitted by defendants irrespective of their answer to said allegations and averments, but for the sole purpose of answering, defendants deny each and every allegation and averment set forth in paragraph fourteen (14) of the Complaint.

8. Defendants deny the allegations contained in paragraphs fifteen (15) and sixteen (16) of the Complaint.

SECOND DEFENSE

9. Plaintiff's Complaint fails to state a cause of action against defendants upon which relief can be granted.

THIRD DEFENSE

10. At the time and place alleged in the Complaint, the plaintiff's injuries and damages, if any, were the result of the actions of Gerald A. Ryan, over whom defendants had no control or responsibility.

FOURTH DEFENSE

11. Defendants allege that at the time and place alleged in the Complaint the plaintiff and Gerald A. Ryan, who was the operator of the motor vehicle in which the plaintiff was riding as a passenger, were engaged in a joint enterprise and that because of said joint enterprise the negligence of Gerald A. Ryan is imputed to the plaintiff.

FIFTH DEFENSE

12. Plaintiff's claims are now and hereafter barred by the applicable statute of limitations.

SIXTH DEFENSE

13. Plaintiff's claims are now and hereafter barred by the applicable equitable doctrine of laches.

WHEREFORE, defendants, Reynoldsville Casket Co. and John M. Blosh, having fully answered, pray that the Complaint be dismissed and that judgment be entered in favor of defendants and against the plaintiff for costs expended herein.

WARREN AND YOUNG

By: _____
WILLIAM E. RIEDEL
Attorneys for defendants

134 West 46th Street
P. O. Box 278
Ashtabula, OH 44004
(216) 997-6175

JURY DEMAND

Defendants hereby submit their demand for a trial of the issues herein by a jury composed of the maximum number of jurors allowable by law.

WARREN AND YOUNG

By: _____
WILLIAM E. RIEDEL
Attorneys for defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was mailed October 12, 1987, to David J. Eardley at 114 East Park Street, Chardon, OH 44024, as attorney for the plaintiff.

_____
WILLIAM E. RIEDEL

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed July 31, 1991)

Case No. 85710

[1] IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
Plaintiff,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants.

JUDGE YOST

JUDGMENT ENTRY

The Judgment Entry of the Court of Common Pleas is printed in the Appendix to the Petition for Writ of Certiorari at pages A27-A34.

JUDGMENT ENTRY AND OPINION OF THE COURT OF APPEALS, ELEVENTH DISTRICT, ASHTABULA COUNTY, OHIO

(Filed July 2, 1992)

No. 91-A-1660

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
) ss.
COUNTY OF ASHTABULA)

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY AND OPINION

The Judgment Entry and Opinion of the Court of Appeals, Eleventh District, Ashtabula County, Ohio is printed in the Appendix to the Petition for Writ of Certiorari at pages A17-A26.

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 9, 1994)

Case No. 92-1682

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

The Opinion of the Supreme Court of Ohio is printed in the Appendix to the Petition for Writ of Certiorari at pages A1-A16.

REHEARING ENTRY OF THE SUPREME COURT OF OHIO

(Dated April 6, 1994)

Case No. 92-1682

THE SUPREME COURT OF OHIO

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

To wit: April 6, 1994

REHEARING ENTRY

The Rehearing Entry of the Supreme Court of Ohio is printed in the Appendix to the Petition for Writ of Certiorari at page A35.

CONSTITUTIONS INVOLVED

United States Constitution—Article VI, Clause 2

Article VI, Clause 2 of the United States Constitution is printed in the Appendix to the Petition for Writ of Certiorari at page A36.

Ohio Constitution—Article I, Section 16

Article I, Section 16 of the Ohio Constitution is printed in the Appendix to the Petition for Writ of Certiorari at page A36.

STATUTES INVOLVED

Ohio Revised Code, Section 2305.10

Ohio Revised Code, Section 2305.10 is printed in the Appendix to the Petition for Writ of Certiorari at pages A37 and A38.

Ohio Revised Code, Section 2305.15

Ohio Revised Code, Section 2305.15 is printed in the Appendix to the Petition for Writ of Certiorari at page A38.

Ohio Revised Code, Section 2305.15(A)

Ohio Revised Code, Section 2305.15(A) is printed in the Appendix to the Petition for Writ of Certiorari at page A39.

(1)

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
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vs.

CAROL L. HYDE,
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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether state courts, in refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988), to civil cases pending at the time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was announced may properly premise their actions on the following grounds:

A. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), dictates that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should not be retroactively applied.

B. *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), allows state courts to tailor their own remedies as they determine the manner in which a United States Supreme Court opinion is to be retroactively applied.

C. When there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails.

LIST OF PARTIES

The Petitioners are the Reynoldsville Casket Company and John M. Blosh.

The Respondent is Carol L. Hyde.

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No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 68 Ohio St.3d 240 (1994) and found at page A1 of the Appendix to the Petition for Writ of Certiorari. ("Pet. App.")

The opinion of the Eleventh District Court of Appeals for Ashtabula County, Ohio, was entered on July 2, 1992 and is found at Pet. App. A17.

The judgment entry of the trial court was entered on July 31, 1991 and is found at Pet. App. A27.

JURISDICTION

The opinion of the Ohio Supreme Court was entered on February 9, 1994. Petitioners' request for a rehearing was denied by the Ohio Supreme Court on April 6, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Article VI, Cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Joint Appendix p. 18.

Ohio Const., Article I, §16, provides in part that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Joint Appendix p. 18.

Ohio Revised Code §2305.10, provides in part that:

> "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

Joint Appendix p. 19.

Ohio Revised Code §2305.15, provides in part that:

> "When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state

or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Joint Appendix p. 19.

Ohio Revised Code §2305.15(A), provides in part that:

"(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Joint Appendix p. 19.

STATEMENT OF THE CASE

On March 5, 1984, John M. Blosh, while driving a truck owned by his employer, the Reynoldsville Casket Co., was involved in an auto accident with another vehicle in which Carol L. Hyde was a passenger. The accident occurred in Ashtabula County, Ohio. The Reynoldsville Casket Co., a Pennsylvania corporation, had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio. John M. Blosh and Carol L. Hyde were also residents of Pennsylvania.

On August 11, 1987, Carol L. Hyde filed suit against John M. Blosh and the Reynoldsville Casket Co. claiming that John M. Blosh, while in the scope of his employment with Reynoldsville Casket Co., was negligent in the operation of Reynoldsville Casket Co.'s truck, said negligence causing bodily injury to Carol L. Hyde. On October 13, 1987, John M. Blosh and the Reynoldsville Casket Co. filed their Answer. Along with denying the allegation of negligence, John M. Blosh and the Reynoldsville Casket Co. raised the affirmative defense that Carol L. Hyde's claim was time barred by Ohio's two-year statute of limitations, O.R.C. §2305.10.

On February 8, 1988, John M. Blosh and Reynoldsville Casket Co. filed a Motion to Dismiss, pursuant to Oh. Civ. R. 12(B)(6), requesting dismissal of Carol L. Hyde's Complaint in that it was time barred by the two-year statute of limitations contained in O.R.C. §2305.10. Carol L. Hyde's response to the Motion to Dismiss was to claim that O.R.C. §2305.15, generally referred to as the Savings Clause, permitted the filing of her Complaint.

While the Motion to Dismiss was pending before the trial Court, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L. Ed. 2d 896 (1988), declared that Ohio's Savings Clause, O.R.C. §2305.15, violated the Commerce Clause of the United States Constitution since it imposed an impermissible burden on interstate commerce. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court declined to address the argument of Bendix that if the Court found O.R.C. §2305.15 unconstitutional, the Court's ruling should be prospective only and not apply to the parties in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

On July 31, 1991, the trial court granted John M. Blosh's and Reynoldsville Casket Co.'s Motion to Dismiss. In dismissing the Complaint of Carol L. Hyde, the trial court applied the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to both Reynoldsville Casket Co. and John Blosh. Upon appeal to the Court of Appeals, the decision of the trial court was affirmed in all respects. As to the issue of prospective application, the Court of Appeals stated:

> "The general rule in Ohio is:
>
> '* * * (A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. * * * ' *State, ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90, quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.' "

Pet. App. A24.

On appeal to the Ohio Supreme Court, in a five-two decision, the judgment of the Court of Appeals was reversed and the case remanded to the trial court for further proceedings. In reversing, the Ohio Supreme Court held that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed.2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

Pet. App. A1.

In support of its decision, the majority advanced two positions. First, the majority stated that:

> "If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

Second, the majority declared that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

Pet. App. A6.

As to the perceived scope of *Harper v. Virginia Dept. of Taxation*, the majority stated:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7, and

"... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

Pet. App. A8. With regard to the reference to remedy found in *Harper v. Virginia Dept. of Taxation*, the remedy adopted by the majority was to simply ignore *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* As stated by the majority:

"The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix*, we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:

'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

Pet. App. A7.

Two justices dissented. In addressing the issue for review, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applies retroactively to bar Carol L. Hyde's personal injury claim, the dissenters noted the following:

"The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74."

Pet. App. A10.

"What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S.Ct. at 2330, 110 L.Ed.2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of decision—*is a matter of federal law.*' " (Emphasis added).

Pet. App. A12.

"The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

Pet. App. A16.

> "The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is binding on the states under the Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent."

Pet. App. A16.

A Motion for Rehearing filed on February 18, 1994 was denied by the Ohio Supreme Court on April 6, 1994.

SUMMARY OF ARGUMENT

The issue for decision in the Ohio Supreme Court was whether this Court's ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* would be retroactively applied to the filing of Respondent's Complaint. In rejecting the retrospective application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority advanced two propositions of law.

First, the majority stated that:

> "If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

To the extent that the majority relied upon *Chevron Oil Co. v. Huson* in the context of a choice of law, its reliance was misplaced in light of the clear directives contained in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.* Likewise, to the extent that the majority utilized *Chevron Oil Co. v. Huson* to create a remedy, its reliance was equally misplaced. As stated by the dissent:

> "No one has suggested, however, that the states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper* . . ."

Pet. App. A12.

The majority's reliance upon *Chevron Oil Co. v. Huson,* in light of *Harper v. Virginia Dept. of Taxation,* was obviously in the context of a remedy analysis. While it is submitted that remedy is not an appropriate issue for review, the retroactive

applicability of judicial decisions being the rule and not the exception, even if *Chevron Oil Co. v. Huson* is applied herein the majority did not conduct a complete *Chevron Oil Co. v. Huson* analysis. In commenting upon the majority's resort to *Chevron Oil Co. v. Huson*, the dissent stated that:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

As to the first prong of any *Chevron Oil Co. v. Huson* analysis, *i.e.*, does the decision represent a "clear break" with past law, the majority failed to comment upon the fact that the U.S. District Court for the Northern District of Ohio, Western Division, three days after Respondent's accident, and the U. S. Court of Appeals for the Sixth Circuit, two months before Respondent filed her suit, both found O.R.C. §2305.15 to be unconstitutional. Likewise, decisions of this Court and other courts had foreshadowed the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

With respect to prongs two and three of the *Chevron Oil Co. v. Huson* analysis, the majority never examined either. The majority's only comment as to either prong was that:

> "Because of the factual similarities between the present case and *Chevron*, it is unnecessary to discuss the other two prongs of the *Chevron* test."

Pet. App. A6.

When critically examined, it is clear that the facts and issues present in *Chevron Oil Co. v. Huson* are not those contained herein.

Whatever reliance the majority placed upon *Chevron Oil Co. v. Huson, i.e.,* whether as a choice of law or remedy, it is clear that the majority's reliance was misplaced. Whether as a choice of law or remedy, *Chevron Oil Co. v. Huson* is not controlling herein.

Aside from any *Chevron Oil Co. v. Huson* analysis, the majority sought further justification for its decision to reject the retrospective application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* by stating that:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7, and

> ". . . when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

Pet. App. A8.

Neither pronouncement of the majority is a correct statement of the law nor did either pronouncement address the dissent's poignant comment that:

"... our state constitution cannot be used to accomplish what the Commerce Clause forbids."

Pet. App. A16.

The Supremacy Clause to the U. S. Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* require that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

ARGUMENT

I. The Ohio Supreme Court, In Refusing To Retroactively Apply The Decision In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988), To Civil Cases Pending At The Time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Was Announced, May Not Premise Its Actions On *Chevron Oil Co. v. Huson*.

In support of its decision, the majority stated:

"If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

Pet. App. A5.

The majority's phraseology that "If *Chevron* remains good law today..." is telling. Since *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*, the continued utility of employing a *Chevron Oil Co. v. Huson* analysis has been subject to considerable legal commentary. See Tereasa A. Dondlinger, Note, *Retroactivity And The Remains of Chevron Oil After Harper v. Virginia Dept. Of Taxation*, 45 Tax Law 455 (1993); Eric Rakowski, *Harper And Its Aftermath*, 1 Fla. Tax Rev. 455 (1993). While *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* cast serious doubt on the continued use of *Chevron Oil Co. v. Huson*, it is clear that the majority of the Ohio Supreme Court nevertheless relied upon *Chevron Oil Co. v. Huson* in rejecting the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, this Court held that Ohio's tolling statute, O.R.C. §2305.15(A), violated the Commerce

Clause to the U.S. Constitution in that it imposed an impermissible burden on interstate commerce. Furthermore, the Court refused to consider the request of Bendix to apply the Court's ruling prospectively and not to the parties in the case.

In affirming the grant of summary judgment in favor of Midwesco, the *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Court stated:

> "Although statute of limitations defenses are not a fundamental right, Chase Securities Corp. v. Donaldson, 325 US 304, 314, 89 L Ed 1628, 65 S Ct 1137 (1945), it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. Cf. Dahnke-Walker Milling Co. v. Bondurant, 257 US 282, 66 L Ed 239, 42 S Ct 106 (1921); Allenberg Cotton Co. v. Pittman, 419 US 20, 42 L Ed 2d 195, 95 S Ct 260 (1974)."

100 L.Ed.2d at 903.

In the instant case, the Ohio Supreme Court did not question the unconstitutionality of O.R.C. §2305.15(A). The issue confronting the Ohio Supreme Court, however, was whether *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should be applied retroactively. In rejecting the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Ohio Supreme Court initially resorted to a *Chevron Oil Co. v. Huson* analysis.

The Ohio Supreme Court's continued reliance upon *Chevron Oil Co. v. Huson* is misplaced in light of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.* Although *James B. Beam Distilling Co. v. Georgia* did not produce a unified opinion, the majority of the Justices agreed that:

> ". . . when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."

115 L.Ed.2d at 493.

The Court's holding in *James B. Beam Distilling Co. v. Georgia* promoted equality by limiting the possibility for disparate treatment of similarly situated litigants. As stated by Justice Souter:

> "Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis."

115 L.Ed.2d at 491.

In his concurring opinion in *James B. Beam Distilling Co. v. Georgia*, with whom Justice Marshall and Justice Blackmun concurred, Justice Scalia, in urging a complete abrogation of any *Chevron Oil Co. v. Huson* inquiry, stated:

"If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art II, §3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of '[t]he Executive power' may be familiar to other legal systems, but is alien to our own. So also, I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art III, §1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed.60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make* it, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses 'difficulties of a . . . practical sort,' ante, at—, 115 L.Ed.2d, at 488, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

"For this reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power."

115 L.Ed.2d at 497.

Justice Blackmun, in commenting upon the concept of prospective application of new decisional rules stated:

"We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce. . . Like Justice Scalia, I conclude that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function."

115 L.Ed.2d at 496.

Since the ruling in *James B. Beam Distilling Co. v. Georgia*, other courts have applied retroactivity without consideration of a *Chevron Oil Co. v. Huson* analysis. *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (1992); *Bottineau Farmers Elevator v. Woodward-Clyde*, 963 F.2d 1064 (8th Cir. 1992); *Boudrea v. Deloitte, Haskins & Sells*, 942 F.2d 497 (8th Cir. 1991) (per curiam); *Welch v. Cadre Capital*, 946 F.2d 185 (*Welch II*) (2d Cir. 1991), *on remand* from, 111 S. Ct. 2882 (1991).

In *Muller v. Custom Distributors, Inc.*, the Court stated that:

"Because of our resolution of this case, we need not analyze this case under the *Chevron* factors."

487 N.W.2d at 6. The issues present in *Muller v. Custom Distributors, Inc.* were essentially the same issues presented in the instant case, *i.e.*, a savings statute, a late filing of a Complaint, a request to apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and a potential *Chevron Oil Co. v. Huson* analysis.

The logic enunciated in *James B. Beam Distilling Co. v. Georgia* was given greater clarity in *Harper v. Virginia Dept. of Taxation* when Justice Thomas stated:

> "Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends Griffith's ban against 'selective application of new rules.' 479 US, at 323, 93 L Ed 2d 649, 107 S Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L Ed 2d 649, 107 S Ct 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. Beam, supra, at _____, 115 L Ed 2d 481, 111 S Ct 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' American Trucking, supra, at 214, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting)."

125 L.Ed.2d 86.

As to the applicability of *Chevron Oil Co. v. Huson,* Justice Thomas stated:

> "We need not debate whether Chevron Oil represents a true 'choice-of-law principle' or merely 'a remedial principle for the exercise of equitable discretion by federal courts.' *American Trucking Assns., Inc. v Smith,* 496 US 167, 220, 110 L Ed 2d 148, 110 S Ct 2323 (1990) (Stevens, J., dissenting). Compare id., at 191-197, 110 L Ed 2d 148, 110 S Ct 2323 (plurality opinion) (treating *Chevron Oil* as choice-of-law rule), with id., at 218-224, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one."

125 L.Ed.2d at FN9, pg. 85.

In *Harper v. Virginia Dept. of Taxation,* Justice Thomas went on to state:

> "Furthermore, the legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a Chevron Oil analysis.' Id., at _____, 115 L Ed 2d 481, 111 S Ct 2439 opinion of Souter, J.)."

125 L.Ed.2d at 87.

As a result of *Harper v. Virginia Dept. of Taxation,* it is clear that the *Chevron Oil Co. v. Huson* test cannot determine the choice of law by relying on

the equities of a particular case. Furthermore, it is equally clear that the federal law applicable to a particular case does not turn on whether litigants actually relied on an old rule or how they would suffer from retroactive application of a new rule. Last, any attempt to employ a *Chevron Oil Co. v. Huson* analysis must be rejected in light of the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so.

In most cases, the issue of retroactivity is not present. In other words, courts apply settled principles and precedents of law to the disputes that come before them. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules. It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the general case arising when a court expressly overrules a precedent upon which the case would otherwise be decided differently and by which the parties may previously have regulated their conduct.

As noted in *James B. Beam Distilling Co. v. Georgia*, since the question is whether the Court should apply the old rule or the new rule, retroactivity is initially a matter of choice of law. The antecedent choice-of-law question is a federal one where the rule at issue derives from federal law, constitutional or otherwise. The issue in the instant case is a question of federal law, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* is controlling on the parties herein. Once a rule is found to apply backwards, there may be a further issue of

remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.

As discussed in *James B. Beam Distilling Co. v. Georgia*, there are three ways in which the choice-of-law issue may be resolved, those being full retroactivity, pure prospectivity and selective or modified prospectivity. Justice Souter discussed at length the three approaches in *James B. Beam Distilling Co. v. Georgia*. 115 L.Ed.2d at 488.

James B. Beam Distilling Co. v. Georgia was concerned with the question of selective prospectivity in the civil context. In rejecting said concept, the *James B. Beam Distilling Co. v. Georgia* Court stated:

> "Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible application of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case."

115 L.Ed.2d 493. As a result of *James B. Beam Distilling Co. v. Ceorgia* and *Harper v. Virginia Dept. of Taxation*, it is clear that *Chevron Oil Co. v. Huson* cannot determine the choice of law by relying upon the equities of the particular case.

Although *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* did not directly address the issue of pure prospectivity, Justice Scalia did in his concurring opinion in *James B. Beam Distilling Co. v. Georgia* wherein he advocated its rejection. See also Justice Blackmun's concurring opinion in *James B. Beam Distilling Co. v. Georgia*, at 115 L.Ed.2d t 496, where he also rejected the concept of pure prospectivity, and Frances X. Beytagh, *Ten Years Of Non-Retroactivity: A Critique and a Proposal*, 61 Va.L. Rev. 1557, 1612 (1975).

Just as *Chevron Oil Co. v. Huson* lacks viability in the context of a choice of law, it lacks equal viability in a discussion of remedy in the instant case. As correctly stated by the dissent:

> "It is indeed curious that a discussion of 'tailoring a remedy' has even surfaced in this case. After all, this case has not yet proceeded beyond the pleading stage. No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case."

Pet. App. A11.

> "No one has suggested, however, that states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper*, which is precisely what the majority accomplishes with its ruling."

Pet. App. A12.

While it is clear from *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* that full retroactivity is the normal rule in civil cases and that *Chevron Oil Co. v. Huson* has limited, if any, applicability, a *Chevron Oil Co. v. Huson* analysis of the facts of the instant case results in the same conclusion reached by the trial Court and Court of Appeals, that being the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The majority of the Ohio Supreme Court in Part I of its opinion stated that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* could not be given retroactive effect under the three-pronged test of *Chevron Oil Co. v. Huson.* In that *Chevron Oil Co. v. Huson* can no longer be used to determine choice-of-law, the majority's resort in *Chevron Oil Co. v. Huson* was therefore in the context of a remedy analysis. However, as noted in the dissent:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

The underlying issue in *Chevron Oil Co. v. Huson* was whether state or federal law determined the timeliness of the filing of Huson's complaint for

bodily injury. In 1968, an action was instituted in the U. S. District Court for the Eastern District of Louisiana to recover for personal injuries sustained approximately two years earlier by Huson while working on Chevron's artificial island drilling rig located on the Outer Continental Shelf off the Louisiana coast. Chevron did not question the timeliness of the action as a matter of laches under admiralty law, which at that time was held to be the applicable law under the Outer Continental Shelf Lands Act in a line of Court of Appeals' decisions.

However, in 1969, while the case was still pending trial, the United States Supreme Court's decision in *Rodriguez v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. (1835), interpreted the Outer Continental Shelf Lands Act as making state law remedies, rather than admiralty law remedies, applicable to such accidents. Relying on the Supreme Court decision, the District Court held that the Louisiana one-year statute of limitations on personal injury actions governed and barred the instant action. On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the Louisiana statute of limitations, being "prescriptive" as barring the remedy but not extinguishing the right to recover, was not applicable under the *Rodriguez v. Aetna Casualty & Surety Co.* decision, and that the case was not barred by the controlling federal law as to the doctrine of laches.

Certiorari was granted by this Court to consider the construction offered by the Court of Appeals for the Fifth Circuit to the Outer Continental Shelf Lands Act and *Rodriguez v. Aetna Casualty & Surety Co.* Accordingly, when the facts and issues present in *Chevron Oil Co. v. Huson* and the instant case are compared, it can hardly be said that:

> "Because of the factual similarities between the present case and *Chevron*, it is unnecessary to discuss the other two prongs of the *Chevron* test."

Pet. App. A6.

The three issues to be considered in a *Chevron Oil Co. v. Huson* analysis are: 1) does the decision represent a "clear break" with past law; 2) would retroactive application further or retard operation of the new rule; and 3) could retroactive application produce substantial inequitable results. *Chevron Oil Co. v. Huson* at 106. Although the Ohio Supreme Court majority found these factors to balance in Respondent's favor, a review of recent authority addressing this question dictates to the contrary.

In *Crespo v. Stapf*, 608 A.2d 241 (1992), the New Jersey Supreme Court decided essentially the same issue and concluded that a *Chevron Oil Co. v. Huson* analysis dictated the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

In *Crespo v. Stapf*, the question of the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* arose in the first instance simultaneously with a challenge to the constitutionality of the New Jersey statute. The latter question is not present herein. Because both elements were present in *Crespo v. Stapf*, the *Crespo v. Stapf* Court concluded that it was still appropriate to conduct a *Chevron Oil Co. v. Huson* analysis of the retroactive issue.

If a complete *Chevron Oil Co. v. Huson* analysis is undertaken in the instant case, the result will be the same as reached by the *Crespo v. Stapf* Court, the trial

Court and the Court of Appeals, that being the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* The first factor in any *Chevron Oil Co. v. Huson* analysis asks whether the litigants and those similarly situated *reasonably* relied upon the settled law in ordering their affairs. In the instant case, the question is whether Respondent was justified in relying upon Ohio's tolling statute, O.R.C. §2305.15(A), in waiting over three and one-half years to file suit against Petitioners.

In addressing the first element of the *Chevron Oil Co. v. Huson* analysis, the *Crespo v. Stapf* Court stated:

> "Long before the statute of limitations ran on Crespo's claim, decisions of this Court and of the United States Supreme Court had foreshadowed our decision that the tolling provisions violate the Commerce Clause. Although litigants may rely on the presumed validity of a statute, *Salorio v. Glaser*, 93 *N.J.* 447, 465, 461 A.2d 1100, *cert. denied*, 464 *U.S.* 993, 104 *S.Ct.* 486, 78 *L.Ed.*2d 683 (1983), several opinions had undermined the application of the statute to individual defendants. Ten years ago the United States Supreme Court in *G.D. Searle v. Cohn, supra*, 455 *U.S.* at 413-14, 102 *S.Ct.* at 1144, 71 *L.Ed.*2d at 258-59, first indicated that the tolling statute might run afoul of the Commerce Clause. In that case, the Court affirmed our holding in *Velmohos* that the statute did not violate the Equal Protection Clause, but remanded consideration of the commerce clause issue to the Third Circuit Court of Appeals. *Thus, when plaintiff's cause of action accrued on March 30, 1983, the United States Supreme Court had already questioned the continuing validity of the statute under the Commerce Clause.*" (Emphasis Supplied).

608 A.2d at 250, 251.

Much like other states, the constitutionality of the Ohio tolling statute was at issue before Respondent's accident of March 5, 1984. On March 8, 1984, three days after Respondent's motor vehicle accident, the U. S. District Court for the Northern District of Ohio, Western Division, in *Copley v. Heil-Quaker,* Case No. C-82-512, (R. 44-54), held that the provisions of O.R.C. §2305.15 were unconstitutional because they violated the Commerce Clause. (R-50). In *Copley v. Heil-Quaker,* Bendix Corp., the same litigant in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was permitted to file an *amicus curiae* brief opposing Heil-Quaker's motion to dismiss.

Copley v. Heil-Quaker arose out of a gas explosion that occurred on December 12, 1975. The Copley's Complaint, filed on August 24, 1982, alleged that in 1967 the Copleys had purchased a furnace manufactured by Heil-Quaker that was installed in their home. Heil-Quaker, a Delaware corporation having its principal place of business in Tennessee, was neither licensed to do business in Ohio nor had it ever appointed an agent for service of process upon it in Ohio.

As noted by the U. S. District Court:

> "Clearly, the plaintiff's claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. §2305.15. That section provides in pertinent part:
>
> > 'When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14

> inclusive . . . does not begin to run until he comes in to the state or while he is so absconded or concealed . . .'
>
> "This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to 'long-arm' service outside the state. *Seeley v. Expert, Ind.*, 26 Ohio St.3d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that §2305.15, as construed in Ohio and applied to a corporation in the position of Heil-Quaker violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause."

(R. at 46).

In holding that O.R.C. §2305.15 was unconstitutional, the U. S. District Court went on to state:

> "This Court agrees with analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. §2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged

> solely in interstate commerce. *The Court therefore finds that the provisions of O.R.C. §2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.*" (Emphasis supplied).

(R. at 50). *Coons v. American Honda Motor Co.*, 463 A.2d 921 (1983) pertained to New Jersey's tolling statute, N.J. Stat. §2A:14-22 (1984) whereas *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (1983) was concerned with Idaho's tolling statute, Idaho Code 30-509 (repealed 1979).

Clearly, as of March 8, 1984, the date *Copley v. Heil-Quaker* was decided, a clear challenge to the constitutionality of Ohio's tolling statute was in the words of the *Crespo v. Stapf* Court, ". . . in the Supreme Court's pipeline". 608 A.2d at 251. Further evidence of the ongoing constitutional "challenge" to O.R.C. §2305.15 is to be found in the opinion of the U.S. Court of Appeals for the Sixth Circuit in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (1987), which was decided and filed on June 3, 1987, approximately two (2) months *before* Respondent filed her lawsuit against Petitioners.

The Court of Appeals in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* affirmed the ruling of the U. S. District Court which held that Ohio's tolling statute imposed an impermissible burden on interstate commerce and thus was unconstitutional. As stated by the U. S. Court of Appeals for the Sixth Circuit:

> "We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand. The Ohio tolling statute, like those of New Jersey and Idaho,

> places the foreign corporation in the . . . difficult position of having to choose between exposing itself to personal jurisdiction in [state] courts by complying with the tolling statute, or, by refusing to comply, to remain liable in perpetuity for all lawsuits containing state causes of action filed against it in [the state].
>
> "*McKinley*, 575 F.Supp. at 945. We find this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause."

820 F.2d at 188. Again, using the words of the *Crespo v. Stapf* Court, the "challenge" to the constitutionality of Ohio's tolling statute had moved ever further as of June 3, 1987 ". . . in the Supreme Court's pipeline".

Actual knowledge of the unconstitutionality of O.R.C. §2305.15 on the part of Respondent was admitted in the Amicus Curiae Brief urging reversal that was filed in the Ohio Supreme Court by Brown & Szaller Co., L.P.A., where it was stated that:

> "It is also clear that neither Carol Hyde nor the Ohio Dalkon Shield victims had any reason to believe that the tolling statute would not continue to protect them from the running of the statute of limitations, *at least until June 3, 1987*, the date when the Sixth Circuit Court of Appeals decided *Bendix*." (Emphasis supplied).

Amicus Curiae Brief of Brown & Szaller Co., L.P.A., urging reversal, at 15.

The fact that Respondent did not file suit until August 11, 1987, over two (2) months after *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided in the U. S. Court of Appeals, casts a fatal

blow to Respondent's argument of *reasonable reliance* upon the constitutionality of O.R.C. §2305.15. Clearly, as of June 3, 1987, Respondent and/or her counsel knew or should have known that the U. S. District Court for the Northern District of Ohio, Western Division, March 5, 1984, and the U. S. Court of Appeals for the Sixth Circuit, June 3, 1987, had declared Ohio's tolling statute to be unconstitutional. As such, there can be no realistic "justifiable reliance" upon a statute that has been declared unconstitutional. Without "justifiable reliance", there can be no vesting of rights.

In light of the ongoing constitutional challenges to tolling statutes, occurring both in Ohio, other state jurisdictions, the federal Courts and the U. S. Supreme Court, Respondent could not have reasonably relied upon O.R.C. §2305.15 when she filed her suit on August 11, 1987. As of August 11, 1987, both a U. S. District Court and a U. S. Court of Appeals had declared Ohio's tolling statute to be unconstitutional. See also *Juzwin v. Asbestos Corp. Ltd.*, 900 F. 2d 686 (3rd Cir., 1990) for another *Chevron Oil Co. v. Huson* analysis that concluded with the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The second *Chevron Oil Co. v. Huson* factor requires the Court to ". . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect." *Chevron Oil Co. v. Huson, supra*, at 106-107. Stated another way, will the purpose of the rule be advanced by retroactive application. The trial Court, Court of Appeals and the *Crespo v. Stapf* Court all found that retroactive application would advance the new rule.

With regard to rule advancement, the reasoning of the *Crespo v. Stapf* Court has equal applicability herein. As stated in *Crespo v. Stapf*:

> "The purpose of our ruling is to prevent New Jersey from burdening interstate commerce by discriminating against nonresident defendants. The failure to give retroactive effect to our finding of unconstitutionality of the statute would deprive nonresident individual defendants, such as Stapf, of the repose to which they are entitled from the running of the period of limitations. Retroactive application of our decision would eliminate discrimination against nonresident individual defendants, ensure equal treatment of all individual defendants, and conform with the Legislature's apparent recognition of the unconstitutionality of the tolling provision."

608 A.2d at 251-252.

In discussing the second prong of the *Chevron Oil Co. v. Huson* test, the Court in *Juzwin v. Asbestos Corp. Ltd.* voiced concerns that have equal applicability to the instant case when it stated that:

> "The effect of our ruling is to ensure that, like New Jersey corporations, foreign corporations that at all times are amenable to service of process under the long-arm rule have the benefit of the state's statutes of limitations. Implementation of our decision will bring New Jersey law into conformity with the rule in the majority of states; that amenability to process by long-arm service renders a tolling statute inapplicable. To give our ruling only prospective effect would retard the purpose of the rule by allowing an entire class of plaintiffs to pursue

> claims against foreign corporations that the statute of limitations would bar against New Jersey corporations. Thus, we conclude that the second factor favors retroactivity as well."

900 F.2d at 900.

Retroactive application will not retard the purpose and effect of Ohio's tolling statute. Ohio cannot justify its tolling statute when the Ohio long-arm statute would permit service of process on foreign corporations and persons throughout the period of limitations. The intent of the tolling statute was clearly not to force foreign corporations and persons to remain liable in perpetuity for all lawsuits containing state causes of action filed against them in Ohio.

To find anything but retroactivity, would be to deprive Petitioners of the repose to which they are constitutionally entitled from the running of the statute of limitations. The retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* eliminates discrimination against nonresident defendants, ensures equal treatment of all defendants and brings Ohio into conformity with the majority rule.

The final *Chevron Oil Co. v. Huson* factor is whether retroactive application would produce inequitable results and adversely affect the administration of justice. *Chevron Oil Co. v. Huson*, at 106. The third factor intertwines with the first factor's focus on reasonable reliance. As stated in *Crespo v. Stapf:*

> "If a plaintiff could have reasonably relied on the tolling provision, retroactive nonrecognition of that provision would be inequitable. *Juzwin*,

supra, 900 F.2d at 696. For reasons previously stated, Crespo and Piermont could not reasonably have relied on the tolling provision. *Supra* at 368-371, 608 A.2d at 250, 251. Nothing in the record indicates that after the accident Stapf was not all times amenable to long-arm jurisdiction. Stapf contends, and Piermont does not refute, that his identity, address, and telephone number were known immediately after the accident and were available to Crespo or his attorney both before and after the accident. Indeed, when Crespo filed suit, he had no problem in serving Stapf. To bar Crespo's claim against Stapf because of Crespo's own failure or that of his attorney to bring a timely action is neither inequitable nor unfair."

608 A.2d at 252.

In the instant case, Respondent had no *reasonable basis* to rely upon O.R.C. §2305.15 in light of the prior rulings in *Copley v. Heil-Quaker* and *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, March 8, 1984, and June 3, 1987, respectively, declaring Ohio's tolling statute to be unconstitutional, when she filed her lawsuit on August 11, 1987. As noted by the trial court:

> "If there was evidence that either of the defendants in this case had absconded, or concealed themselves for the purpose of avoiding process, or were otherwise not amenable to service of process, then the legitimate purposes of the tolling statute would be served by denying them the benefit of the statute of limitations. Both defendants remained at all times subject to jurisdiction under the long arm statutes, R.C. §2307.381, *et seq.* Civ. R. 4.3 provides the method for out-of-state service of process."

Pet. App. A33.

At all times herein, the identities and addresses of Petitioners were known to Respondent. When suit was filed on August 11, 1987, service of process was made upon Petitioners at the same addresses that were available on March 5, 1984. To bar Respondent's claim against Petitioners because of Respondent's own failure or that of her counsel to bring a timely action is neither inequitable nor unfair.

As to the final prong of *Chevron Oil Co. v. Huson* substantial inequitable results, what was applicable in *Crespo v. Stapf* may have equal applicability herein. In *Crespo v. Stapf*, the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* did not leave Crespo without a remedy. That remedy was a malpractice action. In commenting upon the latter course of action, the *Crespo v. Stapf* court stated:

> "Finally, the dissent incorrectly posits that the equities compel prospective application of our decision. It reaches this conclusion because Crespo is remitted to a legal malpractice action, in which he must prove not merely that Stapf's product was defective, but also that Piermont erred. *Post* at 375, 608 A.2d at 254. Missing from the dissent's calculus are the rights of the defendant, Stapf, arising from the expiration of the statute of limitations. Those rights, as the United States Supreme Court has declared, "are an integral part of the legal system * * *." *Bendix Autolite, supra*, 486 *U.S.* at 893, 108 *S.Ct.* at 2221, 100 *L.Ed*2d at 903. According to the Court, a prospective application may be appropriate when a plaintiff "could not have known the time limitation that the law imposed on him." *Chevron Oil, supra*, 404 *U.S.*, at 108, 92 *S.Ct.* at 355, 30 *L.Ed.* 2d at 306-07. Here, however,

> Crespo should have known that *N.J.S.A.* SA:14-22 could not constitutionally toll the running of the statute of limitations on his claim against Stapf. In sum, the equities do not favor prospective application of our decision."

608 A.2d at 253. At a minimum, Petitioners should be afforded the same rights that Stapf was provided in *Crespo v. Stapf.*

II. The Refusal Of The Ohio Supreme Court To Retroactively Apply The Decision In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Is Neither Authorized By *Harper v. Virginia Dept. Of Taxation* Nor Is It In Conformity With The Supremacy Clause Of The United States Constitution Which Prohibits The Federal Retroactivity Doctrine To Be Supplanted By The Invocation Of A Contrary Approach To Retroactivity Under State Law.

In *Davis v. Michigan Department of Treasury,* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, this Court ruled that states may not tax the pensions of former federal workers without imposing a like tax on the retirement income of former state employees. Noting that Michigan had agreed to refund the state income taxes Paul Davis had paid on his federal pension over the years in controversy, the Court stated that he was entitled to a refund. It then remanded the case to allow the Michigan courts and state lawmakers to determine how state and federal retirees were to be treated equally in the future—both taxed according to the same schedule or exempted from tax—and to resolve the refund claims of federal pensioners that had been or might be filed.

Davis v. Michigan Department of Treasury left no doubt that the states must equalize the taxation of federal and state retirees. However, *Davis v. Michigan Department of Treasury* did not address the question whether states owed some form of retroactive relief to all similarly situated federal retirees who had paid higher taxes than had state pensioners.

Virginia was one of the many states affected by the ruling in *Davis v. Michigan Department of Treasury.* In *Harper v. Virginia Dept. of Taxation,* 401 S.E.2d 868 (1991), the Virginia Supreme Court concluded that *Davis v. Michigan Department of Treasury* established a requirement of equal treatment solely for the future. Accordingly, the Virginia Supreme Court refused to order refunds to federal retirees or to impose a retroactive tax on state pensions to secure equality.

In *Harper v. Virginia Dept. of Taxation,* this Court held that *Davis v. Michigan Department of the Treasury* applied retroactively to invalidate all state taxation schemes similar to Michigan's. *Harper v. Virginia Dept. of Taxation* also prescribed a general rule that required the Court's decisions to be applied retroactively. The rule of law announced in *Harper v. Virginia Dept. of Taxation* is clear and to the point. As stated by Justice Thomas:

> "*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as*

to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith's* ban against 'selective application of new rules.' 479 US, at 323, 93 L Ed 2d 649, 107 S Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L Ed 2d 649, 107 S Ct 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can acarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L Ed 2d 481, 111 S Ct 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L Ed 2d 148, 110 S Ct 2323 (Stevens, J., dissenting)." (Emphasis supplied).

125 L.Ed.2d at 86.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided on the basis of a violation of the Commerce Clause to the U. S. Constitution, clearly an issue involving federal law. Decisions of the United States Supreme Court are final and authoritative declarations of federal law and are binding on lower federal courts as well as the state courts. *South Carolina v. Bailey,* 289 U.S. 412, 77 L.Ed. 1292, 53 S.Ct. 667 (1933); *Henry v. Rock Hill,* 376 U.S. 776, 12 L.Ed.2d 79, 84 S.Ct. 1042 (1964).

As noted in *Rivers v. Roadway Express,* 511 U.S. _____, 128 L.Ed.2d 274, 114 S.Ct. _____ (1994):

> "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.[12]"

128 L.Ed.2d at 289.

In refusing to directly apply the rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to the parties herein, the majority attempted to justify its actions by stating:

> "The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, 'retains flexibility' in fashioning appropriate relief."

Pet. App. A7.

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[12] "[7c, 9b] When Congress enacts a new statute, it has the power to decide when the statute will become effective. The new statute may govern from the date of enactment, from a specified future date, or even from an expressly announced earlier date. But when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted. Thus, it is not accurate to say that the Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress."

The "relief" fashioned by the majority is clearly not the tax remedy referred to in *Harper v. Virginia Dept. of Taxation* or *McKesson v. Division of Alc. Bev.*, 496 U.S. 18, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990). Likewise, it is not resort to *any form* of a *Chevron Oil Co. v. Huson* test in that the majority was quite clear in its statement that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

Pet. App. A6.

To the contrary, it is the wrongful validation of an unconstitutional statute under the guise of "... fashioning appropriate relief". As noted by the Court in *Harper v. Virginia Dept. of Taxation*:

> "The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law 'provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.' *McKesson*, 496 US, at 36-37, 110 L Ed 2d 17, 110 S Ct 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.*, at 51-52, 110 L Ed 2d 17, 110 S Ct 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n 36, 110 L Ed 2d

> 17, 110 S Ct 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L Ed 2d 17, 110 S Ct 2238."

125 L.Ed.2d at 89.

The statute of limitations issue present in the instant case is far different from the tax question discussed in *Harper v. Virginia Dept. of Taxation*. Furthermore, whereas *Harper v. Virginia Dept. of Taxation* was a fully adjudicated case, the instant case has not proceeded beyond the pleading stage. As noted by the dissent:

> "No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case."

Pet. App. A11.

On the same day *James B. Beam Distilling Co. v. Georgia* was decided, the Court decided *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson*, 501 U.S. _____, 115 L.Ed.2d 321, 111 S.Ct. _____ (1991), wherein a statute of limitations decision was applied retroactively without employing a *Chevron Oil Co. v. Huson* analysis or consideration of any equitable factors. The retroactive handling of the statute of limitations question was commented upon by Justice O'Connor in her dissent when she stated:

> "This Court has, on several occasions, announced new statute of limitations. Until today, however, the Court has *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent."

115 L.Ed. 23 at 341.

The Court's treatment of the retroactivity question in *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson* was neither cursory nor an oversight. See Justice O'Connor's dissent in *Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson* at 115 L.Ed.2d 343. To the contrary, it was in line with the logic and reasoning set forth in *James B. Beam Distilling Co. v. Georgia* which was further clarified in *Harper v. Virginia Dept. of Taxation.*

As stated in *Rivers v. Roadway Express*:

> "Even though applicable Sixth Court precedents were otherwise when this dispute arose, the District Court properly applied *Patterson* to this case. See *Harper v. Virginia Dept. of Taxation*, 509 US _____, _____, 125 L Ed 2d 74, 113 S Ct 2510 (1993) ('When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule'). See also *Kuhn v. Fairmont Coal Co.*, 215 US 349, 372, 54 L Ed 228, 30 S Ct 140 (1910) ('Judicial decisions have had retrospective operation for near a thousand years') (Holmes, J., dissenting). The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation. See L. Fuller, Morality of Law 56 (1964) ('No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute')."

128 L.Ed.2d at 288.

Just as *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), eliminated limits on retroactivity in the criminal context by overruling *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 601 (1965), *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* have achieved the same result in the civil arena. Today, there should be no impediments standing in the way that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all Courts adjudicating federal law.

The majority in the instant case has chosen to ignore the rule set forth in *Harper v. Virginia Dept. of Taxation* thus creating an impediment to the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in Ohio. The impediment erected by the majority related to its erroneous interpretation of the statement contained in *Harper v. Virginia Dept. of Taxation* that:

> ". . . allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

Pet. App. A7.

"Tailoring" in the instant case resulted in the rejection of the federal rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in favor of the generalities of Section 16, Article I of the Ohio Constitution. In refusing to retroactively apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority failed to consider the Supremacy Clause of the U. S. Constitution which provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Pet. App. A4.

As stated by Justice Thomas in *Harper v. Virginia Dept. of Taxation*:

> "The Supremacy Clause. US Const, Art VI, cl 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 US 358, 364-366, 77 L Ed 360, 53 S Ct 145, 85 ALR 254 (1932), cannot extend to their interpretations of federal law. See *National Mines Corp. v. Caryl*, 497 US 922, 923, 111 L Ed 2d 740, 110 S Ct 3205 (1990) (per curiam); *Ashland Oil, Inc. v. Caryl*, 497 US 916, 917, 111 L Ed 2d 734, 110 S Ct 3202 (1990) (per curiam)."

125 L.Ed. 2d at 88.

Justice Thomas went on to state in *Harper v. Virginia Dept. of Taxation* that:

> "... we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."

125 L.Ed.2d at 86.

What the majority accomplished herein is what Justice Thomas decried in *Harper v. Virginia Dept. of Taxation*, that being the erection of a selective temporal barrier to the application of the federal rule of law announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* The barrier erected by the majority was Section 16, Article I of the Ohio Constitution. As declared by the majority:

> "The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court."

Pet. App. A7.

The clear error of the majority was pointed out by the dissent:

> "However stated, it is clear that federal law controls the issue before us. The majority cites *no* authority for its assertion in Part II of its opinion that a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution must be resolved in favor of the state civil right. Commentators who have examined the issue would disagree. The federal rule of retroactivity—called a federal rule of decision by the majority—is not, as the majority correctly points out, rooted in the Constitution. See *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579, 586 ('retroactive application [of judicial decisions] is not compelled, constitutionally or otherwise'). Instead it may be described as a federal common-law rule. See Field, Sources of Law: The Scope of Federal Common Law (1986), 99 Harv.L.Rev. 883, 890 (defining 'federal common law' as 'any rule of federal law created by a court * * * when the substance of

that rule is not clearly suggested by federal enactments—constitutional or congressional' [emphasis deleted]). Regardless of its origin, however, federal common law is still 'law' within the meaning of the Supremacy Clause and is binding on state court judges. *Id.* at 897 and fn. 64. For this reason, and because the statements by the Supreme Court in the abovementioned cases [*Am. Trucking Assns., Inc. v. Smith,* (1990), 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148; *Ashland Oil, Inc. v. Caryl,* (1990), 497 U.S. 916, 110 S. Ct. 3202, 111 L.Ed.2d 734; *Harper v. Virginia Dept. of Taxation*] directly contradict the majority's assertion, I believe that in this case we cannot apply a state rule of retroactivity. We are bound by the Supremacy Clause of the United States Constitution to apply federal law, even if we believe the application of state law would produce a more palatable result." (Emphasis Supplied).

Pet. App. A13.

The Supremacy Clause to the U. S. Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* require that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

CONCLUSION

For the reasons advanced herein, Petitioners, Reynoldsville Casket Co. and John M. Blosh, respectfully request this Court to reverse the decision of the Ohio Supreme Court and to enter final judgment in favor of Petitioners, Reynoldsville Casket Co. and John M. Blosh.

Respectfully submitted,

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(9)

No. 94-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REYNOLDSVILLE CASKET CO., *et al.*,

Petitioners,

v.

CAROL L. HYDE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether federal law requires the dismissal of state court cases that appeared timely when filed, but proved untimely under the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On March 5, 1984, while driving a truck owned by petitioner Reynoldsville Casket Company, petitioner John Blosh struck another car in which respondent Carol Hyde was a passenger. Pet. App. A19. The accident occurred in Ashtabula County, Ohio. *Id.* Respondent suffered substantial injuries as a result. *Id.*

Ohio imposes a two-year statute of limitations for personal injury claims. Ohio Rev. Code § 2305.10. At the time of the accident, however, a tolling statute prevented the limitations period from running against any prospective defendant (whether an Ohio resident or otherwise) while that defendant remained "out

of state" or "concealed." *Id.* § 2305.15.[1] Under then-binding Ohio precedents, Section 2305.15 clearly applied both to Reynoldsville Casket, a Pennsylvania corporation with neither an office nor an appointed agent in Ohio (Pet. App. A30), and to Blosh, who is also a Pennsylvania resident (Pet. App. A31). *See, e.g., Seeley v. Expert, Inc.*, 269 N.E.2d 121 (Ohio 1971); *May v. Leidli*, 513 N.E.2d 1347, 1349 (Ohio Ct. App. 1986) ("If a defendant is not amenable to personal service within the state of Ohio, he is presumed to be 'out of state' within the meaning of R.C. 2305.15.").[2] No case had suggested that the statute was unconstitutional. Indeed, just two years earlier, this Court in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), while reserving a Commerce Clause issue, had upheld a substantially more onerous New Jersey tolling statute against Equal Protection challenge.

On August 11, 1987, respondent filed a personal injury action against petitioners in the Court of Common Pleas of Ashtabula County. J.A. 6. Respondent alleged a claim against Blosh for negligence and a claim against Reynoldsville Casket, as Blosh's employer, under a theory of respondeat superior. J.A. 7-8. Petitioners moved to dismiss the complaint as untimely (J.A. 1) on the ground that Section 2305.15 was unconstitutional.

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[1] When respondent filed this lawsuit, Section 2305.15 provided that:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14 . . . does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Pet. App. A3-A4. A successor provision is identical in all material respects. *See* Pet. Br. 3-4 (quoting both provisions).

[2] As the Ohio Supreme Court explained, *May* set forth the "most recent interpretation" of Section 2305.15 binding on the trial court in which respondent filed suit. Pet. App. A8.

On June 17, 1988, almost one year after respondent had filed her complaint, and while petitioners' motion to dismiss was still pending, this Court held in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that Section 2305.15 violated the Commerce Clause.[3] The Court evaluated Section 2305.15 under the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which requires a determination whether "the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). The Court reasoned that Section 2305.15 imposed a "significant" burden on interstate commerce by requiring out-of-state defendants, as a condition of obtaining protection of the Ohio statutes of limitations, to "appoint a resident agent for service of process" and thereby "subject [themselves] to the general jurisdiction of the Ohio courts." 486 U.S. at 892. Moreover, despite acknowledging the "important" consideration that serving out-of-state defendants "may be more arduous" than serving in-state defendants (*id.* at 893), and even though *Searle* recently had held that states may eliminate this disparity through tolling statutes without violating the Equal Protection Clause, the Court now stressed that "state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny." *Id.* at 894. The Court concluded that because the "significant" interstate burdens exceeded the "important" local benefits, Section 2305.15 must be invalid. *See id.* at 891-95.

Following *Bendix*, the Court of Common Pleas dismissed respondent's complaint in its entirety (Pet. App. A27), and the Court of Appeals of Ashtabula County affirmed (Pet. App. A18). That court held that *May v. Leidli*, its own recent precedent on point, was "no longer binding" after *Bendix*. Pet. App. A23. The court further held that even though *Bendix* had established a

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[3] This Court affirmed a Sixth Circuit decision announced approximately two months before respondent filed her complaint. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (6th Cir. 1987).

"clear break in the law," retroactive application of *Bendix* was nonetheless required. Pet. App. A25-A26.

The Ohio Supreme Court reversed the dismissal and remanded for a trial on the merits. Pet. App. A1. First, the Court held that under the three remedial considerations set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), federal law did not require the dismissal under *Bendix* of complaints filed before that case was decided. The court explained that *Bendix* established a "new principle of law" in Ohio, within the meaning of *Chevron Oil* (*id.* at 107), because *Bendix* marked "the first time that any court of binding authority in Ohio's state courts had ruled [Section] 2303.15 unconstitutional." Pet. App. A6. Moreover, stressing the "factual similarities" between this case and *Chevron Oil*, the court held that refusals to dismiss pre-*Bendix* complaints would not "retard the operation" of *Bendix*, and that dismissals would inflict "injustice or hardship" on plaintiffs like respondent. Pet. App. A5-A6.

Next, the Ohio Supreme Court explained that *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), which confirmed that the decisions of this Court apply retroactively, preserved some latitude for state courts to "tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied." Pet. App. A7. In particular, the court suggested, *Harper* does not require state courts to afford retroactive remedies for constitutional violations established by the retroactive application of a new rule of law.[4]

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[4] In the alternative, the court held that because *Harper*'s retroactivity holding rested on non-constitutional grounds, and because a dismissal remedy would violate a state constitutional provision guaranteeing open courts (Ohio Const. Art. I, § 16), dismissal would be inappropriate even if it were commanded by *Harper* as a matter of federal law. Pet. App. A9. We agree with petitioners that this alternative holding misapprehends the clear command of the Supremacy Clause (U.S. Const. Art. VI, cl. 2), under which applicable federal law (even if non-constitutional) displaces all conflicting state law (even if constitutional).

Two judges dissented, stressing that *Harper* requires the retroactive application of this Court's decisions as a matter of federal law. Pet. App. A10. On the separate question whether *Harper* also requires retroactive remedies, the dissenters made two points. First, even though they urged affirmance of the dismissal of respondent's complaint, they argued that consideration of any remedial issue was somehow premature because there had been no "finding of liability" made against petitioners. Pet. App. A11. Second, they argued that even though federal law sometimes permits the denial of retroactive remedies, "[n]o one has suggested, however, that states may use the remedy issue as a way to avoid application of the retroactivity rule from *Harper*, which is precisely what the majority accomplishes with its ruling." Pet. App. A12.

SUMMARY OF ARGUMENT

Whenever a judicial decision announces a new rule of law, two distinct questions involving retroactivity are presented: first, whether the decision applies retroactively as a choice-of-law matter; and second, if it does, whether the novelty of the decision should affect the remedies available for pre-decision conduct or violations.

Harper v. Virginia Department of Taxation, 113 S. Ct. 2510 (1993), held that the decisions of this Court apply retroactively, but did not address any separate question about remedies. In *Harper*, the Court adopted in the civil context Justice Harlan's position that prospective application is incompatible with the judicial role. Justice Harlan also argued, however, that courts may permissibly deny remedies against parties who, at the time of their actions, reasonably relied on existing law. *See United States v. Estate of Donnelly*, 397 U.S. 286, 295-96 (1970) (concurring opinion). In the important civil retroactivity opinions between *Estate of Donnelly* and *Harper*, Justices embracing the

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The court's error on this point, however, leaves undisturbed its holding that *Harper* does not require the dismissal of pre-*Bendix* complaints.

Harlan position against prospectivity also consistently embraced the Harlan position in favor of remedial limitations. *See American Trucking Ass'ns v. Smith*, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (opinion of Souter, J.). By its terms, *Harper* did nothing more than adopt for the Court the position against retroactivity expressed in those opinions, leaving undisturbed its longstanding view that remedial limitations are permissible.

The sole question here is whether remedial limitations consistent with the standards applied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), violate the Due Process Clause or any other provision of the federal Constitution. The Constitution permits some constitutional violations, including the one at issue here, to go unremedied. This case involves a defendant's rights under a statute of limitations. Because statutes of limitations are merely "expedients," the Due Process Clause permits legislatures to retroactively revive expired limitations periods. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-14 (1945). Moreover, courts retain broad equitable power to toll statutes of limitations in a wide variety of circumstances. *See, e.g., American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Consistent with longstanding equitable principles, this Court repeatedly has held, in *Chevron Oil* and its progeny, that the federal courts should toll the limitations period and decline to dismiss claims that appear timely when filed, but are rendered untimely by the retroactive application of a subsequent judicial decision. The *Chevron Oil* principles clearly apply to cases where, as here, the subsequent judicial decision involves a constitutional question. Moreover, if the federal courts may impose remedial limitations when the *Chevron Oil* principles are satisfied, then the state courts may do the same.

The remedial limitation approved in *Chevron Oil* is also consistent with a wide range of analogous doctrines. In the qualified immunity and federal habeas contexts, this Court has adopted even broader limitations on the availability of remedies

for constitutional violations established by the retroactive application of new law. Moreover, by permitting delay in the implementation of its injunctive decrees, this Court has adopted analogous remedial limitations even where prospective relief is at issue. Finally, invoking principles like those used in *Chevron Oil*, this Court has adopted limitations on the availability of retroactive relief for a wide variety of constitutional, statutory and procedural violations not involving statute of limitations issues.

A practice this common is unlikely to violate the Due Process Clause, and petitioners cite no authority suggesting that it does. *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), does not advance their position. *McKesson* held that the Due Process Clause requires retroactive relief in favor of taxpayers forced to pay an unconstitutional tax without any opportunity to challenge the tax in advance. *McKesson*, however, did not involve the retroactive application of new law. And in any event, *McKesson* turned on the very different remedial considerations that apply in the tax refund context.

The Ohio Supreme Court correctly held that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), satisfied the *Chevron Oil* criteria. First, by invalidating an Ohio tolling statute applied for almost two centuries without hint of constitutional difficulty, *Bendix* clearly established a new principle of law. Second, the purposes of the *Bendix* rule — to prevent the states from discriminating against or unreasonably burdening interstate commerce — do not require retroactive remedies, because the Ohio Supreme Court's neutral application of *Chevron Oil* will affect only a closed class of past cases. Third, dismissing respondent's complaint, notwithstanding her obvious reliance on a presumptively valid tolling statute, would produce an inequitable result.

Finally, petitioners do not, and could not, argue that the Ohio Supreme Court invoked the remedial limitation approved in *Chevron Oil* as a pretext for discrimination on any basis that the Constitution prohibits.

ARGUMENT

Whenever a judicial decision announces a new rule of law, two distinct questions involving retroactivity are presented. The issue of retroactivity as such — "whether the court should apply the old rule or the new one" to events that occurred prior to the decision — is "a matter of choice of law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (opinion of Souter, J.). That choice-of-law determination is a pure question of federal law. *See, e.g., Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2518-19 (1993).

In *Harper*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. The Court explicitly rejected the technique of "selective" prospectivity, under which a new rule would apply to the decision in which it was announced, but to no other cases involving pre-decision events. *See id.* at 2517-18. Moreover, the Court's broad language cast grave doubt on the permissibility of "pure" prospectivity, under which a new rule would not apply even to the decision in which it was announced. *See, e.g., id.* at 2516 ("'[T]he nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." (citation omitted)). As a result of *Harper*, there is no question that *Bendix* retroactively invalidated Section 2305.15.

Once a new rule is applied retroactively, however, "there may then be a *further* issue of remedies, *i.e.*, whether the party prevailing under the new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Beam*, 501 U.S. at 535 (opinion of Souter, J.) (emphasis added).[5] Because federal law merely "sets certain minimum requirements

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[5] *See also American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion) ("It is important to distinguish the question of retroactivity at issue in this case from the distinct remedial question"); *id.* at 210 (Stevens, J., dissenting) ("This case . . . requires us for the first time to expressly distinguish between retroactivity as a choice-of-law rule and retroactivity as a remedial principle.").

that the States must meet but may exceed in providing appropriate relief," *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178-79 (1990) (plurality opinion), the remedial issue, at least in cases arising in state court, involves a "mixed question of state and federal law." *Id.* at 205 (Stevens, J., dissenting). *See also Harper*, 113 S. Ct. at 2519-20. Thus, notwithstanding the existence of a constitutional violation in this case, a distinct remedial question remains: whether federal law requires the Ohio courts to grant petitioners a retroactive remedy — dismissal of respondent's pre-*Bendix* complaint — notwithstanding respondent's reasonable reliance on existing law when she filed her complaint.

In *Chevron Oil v. Huson*, 404 U.S. 97 (1971), this Court addressed a similar question. There, as here, a plaintiff filed a complaint that appeared timely when filed, but that proved untimely under a subsequent decision of this Court. After noting that "[t]he most [the plaintiff] could do was to rely on the law as it then was" (*id.* at 107), and after conducting a "weighing of the equities" that took such reliance into account (*id.* at 109), this Court held that federal law did not require a retroactive dismissal remedy. *Id.* To that extent, *Chevron Oil* was consistent with well-settled equitable and remedial principles. *See, e.g., City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-21 (1978); *Lemon v. Kurtzman*, 411 U.S. 192, 199-206 (1973) (*Lemon II*). While Justice O'Connor and Justice Stevens debated in *American Trucking* whether *Chevron Oil* also set forth a choice-of-law holding, there is now general agreement that *Chevron Oil* contained at least an alternative remedial holding. *See, e.g., Harper*, 113 S. Ct. at 2537 (O'Connor, J., dissenting); *American Trucking*, 496 U.S. at 218-25 (Stevens, J., dissenting).

Harper, of course, overruled *Chevron Oil* to the extent that *Chevron Oil* rested on a choice-of-law rationale. The question presented here is whether *Harper* or the Constitution also require

this Court to overrule *Chevron Oil's* remedial holding. They clearly do not.[6]

I. *HARPER* DOES NOT ADDRESS ANY QUESTION ABOUT REMEDIES

Throughout their brief, petitioners correctly insist that *Harper* compels the retroactive application of *Bendix*.[7] However, petitioners themselves acknowledge that the retroactivity question and the remedial question are distinct. Pet. Br. 22-23 ("Once a rule is found to apply backwards, there may be a further issue of remedies"). And, petitioners further acknowledge that the Ohio Supreme Court's consideration of respondent's reliance interests, within the framework of *Chevron Oil*, "was obviously in the context of a remedy analysis." Pet. Br. 11. *Harper* has nothing to do with the distinct remedial question presented here.

The Court's current retroactivity doctrine, established in the criminal context in *United States v. Johnson*, 457 U.S. 537 (1982), and *Griffith v. Kentucky*, 479 U.S. 314 (1987), and in the civil context in *Beam* and *Harper*, explicitly reflects the views expressed by Justice Harlan in his seminal separate writings in *Desist v. United States*, 394 U.S. 244 (1969), and *Mackey v.*

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[6] Like the dissenting judges below, petitioners also contend that consideration of any remedial issue is unripe because petitioners have not yet been found liable to respondent. Pet. Br. 24. This argument is insubstantial. The remedial question before the Court is not whether respondent is entitled to recover damages from petitioners, but whether petitioners are entitled, given that *Bendix* has retroactively invalidated Section 2305.15, to have respondent's pre-*Bendix* complaint dismissed as untimely. There is nothing premature about that question.

[7] In *Bendix* itself, this Court affirmed the dismissal of a complaint on statute of limitations grounds, but declined to address whether the *Chevron Oil* criteria had been satisfied because that question was not preserved in the courts below. *See* 486 U.S. at 895.

United States, 401 U.S. 667 (1971).[8] In *Desist* and *Mackey*, Justice Harlan levelled three related criticisms against the Court's then-current practice of "selective" prospectivity in criminal cases: first, it unfairly treated similarly situated defendants differently; second, it undermined the integrity of judicial review; and third, it enmeshed the courts in fundamentally legislative controversies. *See* 394 U.S. at 258-59 (dissenting opinion); 401 U.S. at 677-81 (opinion concurring in the judgment).

In 1970, however, Justice Harlan wrote an equally important opinion making clear that his views on retroactivity were entirely consistent with the many precedents of this Court embracing remedial discretion — including remedial discretion to account for reliance on old law subsequently modified. In *United States v. Estate of Donnelly*, 397 U.S. 286 (1970), Justice Harlan extended his attack on prospectivity to the civil context:

> The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court.

Id. at 295-96 (concurring opinion). At the same time, however, Justice Harlan confirmed that reliance interests are entirely appropriate remedial considerations:

> To the extent that equitable considerations, for example, "reliance," are relevant, I would take this into account in the

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[8] The Court also has explicitly adopted Justice Harlan's position in *Desist* and *Mackey* that the special nature of federal habeas corpus justifies the denial of retroactive relief under new rules of criminal procedure announced after a conviction has become final on direct review. *See, e.g., Butler v. McKellar*, 494 U.S. 407 (1990); *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

> determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy. . . . The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.

Id. at 296-97.

In this Court's subsequent opinions in the civil context leading to *Harper*, Justices embracing the Harlan position plainly approved both the retroactivity *and* the remedial elements of Justice Harlan's analysis in *Estate of Donnelly*. Thus, speaking for four Justices in *American Trucking*, Justice Stevens argued that while "adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law," that "current understanding" may "include a law of damages that recognizes reliance interests." 496 U.S. at 214 (dissenting opinion). *See also* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1798 (1991) ("[A] court must apply the relevant law, but the relevant law includes the law of remedies, under which it may be appropriate to deny relief even where a violation has been found.").

Announcing the lead and controlling opinion in *Beam*, Justice Souter also argued that while litigants cannot be "distinguished for choice-of-law purposes on the particular equities of their claims" (501 U.S. at 543), "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases" (*id.* at 543-44). Justice Souter stressed the point repeatedly: "Nothing we say here deprives respondent of his opportunity to . . . demonstrate reliance interests entitled to

consideration in determining the nature of the remedy that must be provided." *Id.* at 544 (citing *Estate of Donnelly*, 397 U.S. at 296 (Harlan, J., concurring)).

Against this background, nothing in *Harper* even remotely suggests that the Court intended to restrict the availability of remedial discretion, whether to account for reliance interests or otherwise. The only issue before the Court was a choice-of-law question, since the court below had held that tax assessments inconsistent with *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), but rendered prior to that decision, "'were neither erroneous nor improper.'" *Harper*, 113 S. Ct. at 2514 (quoting opinion below). In rejecting that position, the Court merely adopted a *retroactivity* rule that "fairly reflects the position of a majority of Justices in *Beam*." *Id.* at 2517. The Court further confirmed Justice Souter's position that "'the *Chevron Oil* test cannot determine *the choice of law* by relying on the equities of a particular case.'" *Id.* at 2516 n.9 (quoting *Beam*, 501 U.S. at 543 (emphasis added)). After rejecting the lower court's non-retroactive application of *Davis*, the Court remanded the case, without addressing the question whether reliance interests could support the exercise of remedial discretion, for the lower courts to perform "tasks pertaining to the crafting of any appropriate remedy." *Id.* at 2520. In sum, the five-Justice majority in *Harper*, which included Justices Stevens and Souter, gave absolutely no indication that it was abandoning the principles of remedial discretion embraced by Justice Harlan in *Estate of Donnelly*, by Justice Stevens in *American Trucking*, and by Justice Souter in *Beam*.

Although urging in *Harper* that *Chevron Oil* should support the prospective application of *Davis*, Justice O'Connor also addressed the remedial issues not reached by the Court. She too argued that "it should be constitutionally permissible for the equities to inform the remedial inquiry." *Id.* (dissenting opinion). She also explained — without provoking any disagreement from the majority — that the Court's retroactivity holding did not address "the separate question of the *remedy* that must be given." *Id.* at 2536 (emphasis in original). Finally, she explained that "[i]f

Justice Stevens' view or something like it has prevailed today — and it seems that it has — then state and federal courts still retain the ability to exercise their 'equitable discretion' in formulating appropriate relief on a federal claim." *Id.* Justice Kennedy likewise explained that nothing in *Harper* is "inconsistent" with the proposition that "equitable considerations may inform the formulation of remedies when a new rule is announced." *Id.* at 2526 (opinion concurring in the judgment).

It is perfectly clear that *Harper*, which held only that *Chevron Oil* "'cannot determine the choice of law'" (113 S. Ct. at 2516 n.9 (quoting *Beam*, 501 U.S. at 543 (opinion of Souter, J.))), leaves undisturbed *Chevron Oil*'s more limited remedial holding.[9]

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE STATE COURTS TO DISMISS COMPLAINTS MADE UNTIMELY THROUGH THE RETROACTIVE APPLICATION OF NEW CONSTITUTIONAL RULES

The Ohio Supreme Court has determined that extending the Ohio statute of limitations is appropriate for those who, like respondent, relied on the Ohio tolling statute. The sole question presented here is whether the Due Process Clause or some other provision of the federal constitution obligated Ohio to provide a dismissal remedy. Petitioners argue that the Due Process Clause itself requires the Ohio state courts to dismiss respondent's

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[9] Petitioners are also wrong to suggest (Pet. Br. 43-44) that this Court silently overruled *Chevron Oil*'s remedial holding in *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), another case involving the retroactive application of a decision shortening an applicable limitations period. The Court's silence about retroactivity issues in *Lampf* clearly does *not* constitute an implicit determination to foreclose remedial limitations, as *Beam* itself made clear. *Compare* 501 U.S. at 538 (opinion of Souter, J.) (choice-of-law retroactivity presumed because the Court "did not reserve" the issue) *with id.* at 543-44 (retroactivity determination does not "preclud[e] consideration of individual equities when deciding remedial issues in particular cases").

complaint, even though its untimeliness was established only through the retroactive application of *Bendix* and even though respondent plainly was relying on the presumptively valid Ohio tolling statute. Pet. Br. 41-43.

Like the dissenting judges below, petitioners appear to rest on the premise that the Due Process Clause requires a judicial remedy for every constitutional violation. Pet. Br. 42. But the Constitution itself "is singularly bare of remedial specification: it lays down a multitude of substantive rules but says virtually nothing about what is to happen if these are violated (or about who is to decide what is to happen if they are)." P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 926 (3d ed. 1988). And, while this Court has imposed limits on the power of the states to deny remedies for constitutional violations (*see, e.g., McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 n.9 (1987)), it has never embraced the categorical position urged here by petitioners.

As a general matter, as Justice Scalia has explained, "it is simply untenable that there must be a judicial remedy for every constitutional violation." *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (dissenting opinion). The Constitution itself creates rights that are nonjusticiable (*see, e.g., Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930) (Guaranty Clause)) and defines circumstances where judicial remedies are explicitly prohibited (*see, e.g., Nixon v. United States*, 113 S. Ct. 732 (1993) (judicial review of impeachment trials)). Limitations on the damages remedy available under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), ensure that some constitutional violations will go unremedied. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987). Absolute immunity doctrines ensure that, even if a *Bivens* or 42 U.S.C. § 1983 remedy were otherwise available, other constitutional violations will go unremedied. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978). Sovereign immunity doctrines stand as a

"monument to the principle that some constitutional claims can go unheard." *Webster v. Doe*, 486 U.S. at 613 (Scalia, J., dissenting). The requirement of "individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command." Fallon & Meltzer, *supra*, at 1789. In constitutional law as elsewhere, "[r]emedies may be limited by practical considerations." I D. Dobbs, *Law of Remedies* 30 (2d ed. 1993).

This case presents the specific question whether state courts may constitutionally deny the harsh remedy of dismissing complaints rendered untimely through the retroactive application of *Bendix*. For several reasons, they clearly may. To begin with, it is undisputed that states may invoke their own statutes of limitation (*see, e.g., McKesson*, 496 U.S. at 45) or claim preclusion doctrines (*see Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); 28 U.S.C. § 1738) to deny remedies for constitutional violations. *See, e.g., Harper*, 113 S. Ct. at 2517 (state courts must apply new rules "in all cases still open on direct review"); *Estate of Donnelly*, 397 U.S. at 296-97 (Harlan, J., concurring) (courts must apply new rules "short of a bar of *res judicata* or statute of limitations"). There are, in other words, clear limits on a state's obligation to provide remedies for retroactively established constitutional violations. While the remedial limitation at issue here does not involve the application of a limitations period as such, it does involve a defendant's rights under a statute of limitations. Limitations periods are generally subject to retroactive revision (*see Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311-14 (1945)) and to the courts' equitable power "to craft rules of tolling, laches, and waiver" (*American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting)). Consistent with these principles, *Chevron Oil* and its progeny confirm the permissibility of a tolling principle that bars dismissal of complaints that appear timely when filed, but are rendered untimely through the retroactive application of a decision of this Court. Moreover, even outside the statute of limitations context, this Court repeatedly has approved remedial limitations designed

to protect the interests of those who, like respondent, reasonably rely on existing law.

The principle we urge is limited in two important respects. First, we contend only that the state courts are constitutionally permitted, but not constitutionally compelled, to deny retroactive remedies under these circumstances. Although some states might afford retroactive remedies against pre-*Bendix* complaints, even though Ohio would not, it is well settled that states "may" — but need not — "provide relief beyond the demands of federal due process." *Harper*, 113 S. Ct. at 2520. Second, since the Ohio Supreme Court correctly held that *Bendix* satisfies the remedial criteria set forth in *Chevron Oil*, which address the specific problem of reasonable reliance on existing law, this Court need not speculate as to whether the *Chevron Oil* criteria define the outer boundaries of state power in this area.

A. Consistent with the Due Process Clause, State Courts Retain Broad Equitable Discretion To Grant or Deny Remedies Under Statutes of Limitations

This Court has long recognized that statutes of limitations "represent expedients," and "[t]heir shelter has never been regarded as what is now called a 'fundamental right.'" *Chase*, 325 U.S. at 314. Thus, the Due Process Clause permits legislatures to retroactively revive expired limitations periods and thereby "divest the defendant of the statutory bar." *See id.* at 311-12. And, as Justice Stevens has explained, statutes of limitations constitute an area over which "courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver" (*American Trucking*, 110 S. Ct. at 2354 (dissenting opinion)), which likewise extend limitation periods that by their terms have expired. *See also* I C. Corman, *Limitation of Actions* § 1.1, at 4 (1991) ("Considered in terms of the earlier right-remedy categorization, statutes of limitations bear on the availability of remedies and, as such, are subject to equitable defenses including estoppel, laches, the various forms of tolling, and potential application of the discovery rule.").

Most relevant here is the courts' well-settled equitable power to toll statutes of limitations and thereby preserve otherwise untimely claims. Under the tolling doctrine, "the strict command of the limitation period" may be "suspended" in the interests of fairness. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974). "Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (footnote omitted).[10]

A wide variety of considerations support equitable tolling, ranging from a defendant's own wrongful conduct (*see, e.g., id.* (defendant misled plaintiff about limitations period)), to procedural irregularities (*see, e.g., Burnett v. New York Central R.R.*, 380 U.S. 424, 431-32 (1965) (plaintiff filed complaint in wrong court)), to exigent circumstances beyond the control of either party (*see, e.g., id.* at 429 (approving tolling "when war has prevented a plaintiff from bringing his suit, even though a defendant in such a case might not know of the plaintiff's disability and might believe that the statute of limitations renders him immune from suit")). Because "[t]his equitable doctrine is read into every federal statute of limitation" (*Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)), it routinely applies where,

[10] Conversely, courts retain a traditional equitable power to impose timeliness requirements where the legislature has not done so. This Court has used at least three different methods to impose such requirements on federal claims: by applying traditional equitable principles of laches (*see, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946)), by "borrowing" analogous state statutes of limitations (*see, e.g., Reed v. United Transportation Union*, 488 U.S. 319 (1989)), or by "borrowing" analogous federal statutes of limitations (*see, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987)).

as here, the underlying claim is for money damages. *See, e.g., American Pipe*, 414 U.S. 538; *Burnett*, 380 U.S. 424.[11]

The equitable tolling doctrine is but one application of centuries-old principles of equitable discretion. Under those principles, remedies need not issue "mechanically" for "every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Thus, an injunction "does not issue as a matter of course" (*Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 541, 542 (1987)), and a declaratory judgment "should be granted only as a matter of judicial discretion" (*Eccles v. People's Bank of Lakewood Village*, 333 U.S. 426, 431 (1948)). "The equity system treats access to its remedies as at least in part a privilege." I D. Dobbs, *supra*, at 57.

In *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944), this Court summarized the flexibility of equitable discretion: "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Under this principle, courts retain discretion to deny remedies — even for violations that produce irreparable injuries — based on their assessment of the parties' "competing claims of injury" in each particular case. *Amoco Production Co.*, 480 U.S. at 542; *Romero-Barcelo*, 456 U.S. at 312. *See also Eccles*, 333 U.S. at 431 ("It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.").

Like this case, *Chevron Oil* presented the "competing claims" of a plaintiff who had relied on existing law and a defendant who

[11] Even outside the limitations context, courts often invoke equitable principles to deny remedies for claims at law. For example, courts routinely apply equitable doctrines of waiver and estoppel (*see, e.g.*, D. Laycock, *Modern American Remedies* 907-08 (1985)), and this Court has extended equitable principles of *in pari delicto* to many claims at law, including damages actions for securities fraud and antitrust violations (*see, e.g., Pinter v. Dahl*, 486 U.S. 622, 633-34 (1988)).

had acquired a valid limitations defense under the retroactive application of a subsequent decision of this Court. In evaluating those claims, the Court stressed the importance of the plaintiff's reliance interests (404 U.S. at 107 ("The most he could do was to rely on the law as it then was")), the unfairness to the plaintiff of a dismissal remedy (*id.* at 108 ("It would . . . produce the most 'substantial inequitable results'") (citation omitted)), and the relatively limited imposition of simply making the defendant litigate on the merits (*id.* (refusal to dismiss "simply preserves [plaintiff's] right to a day in court")). Applying traditional equitable principles, the Court held that dismissal of the complaint was an inappropriate remedy under these circumstances. *See id.* at 108-09. Since *Chevron Oil*, the Court repeatedly has applied these principles in the statute of limitations context. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987). The application of these equitable doctrines to toll a statute of limitations cannot possibly violate the Due Process Clause.

B. Even Outside the Statute of Limitations Context, This Court Frequently Has Recognized That Changes in Decisional Law Justify Denying Remedies For Constitutional Violations

"[I]t is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Nixon v. Fitzgerald*, 457 U.S. 731, 754-55 n.37 (1982). On the contrary, remedies are often denied against those who, like respondent here, reasonably rely on law that is subsequently — and retroactively — changed by decisions of this Court. "The novelty of a judicial ruling may be an important influence in a remedial calculus. For it may be unfair, or at least highly disruptive, to insist upon standard remedies for all past conduct condemned by an unpredictable ruling." Fallon & Meltzer, *supra*, at 1765.

This Court's decisions reflect acute concern for the potential unfairness associated with the retroactive application of new rules. Just last Term, the Court stressed the fundamentality of that

concern: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). *Landgraf*, of course, confirmed the longstanding presumption that statutes (including those that shorten limitations periods) do not apply retroactively. *See id.* at 1497-1505; *United States v. St. Louis S.F. & T. Rwy.*, 270 U.S. 1 (1926).

This Court has fashioned numerous other doctrines to protect reliance interests from being upset by the decisional law of the Court. Some find expression in general rules that prohibit awarding retroactive remedies when the conduct at issue was not clearly unlawful under existing law. Others involve case-by-case determinations to delay the prospective implementation of federal decrees. Finally, yet others involve application, outside the statute of limitations context, of exactly the kind of remedial considerations recognized in *Chevron Oil*. While none of these areas involves issues identical to those presented here, together they fatally undercut petitioners' contention that even where reliance interests are at stake, the Due Process Clause requires full remediation of every constitutional violation.

1. Qualified Immunity and Habeas Corpus Doctrines Categorically Prohibit Remedies For Newly Established Constitutional Violations

The doctrine of qualified immunity establishes a categorical rule that government officials cannot be liable in damages for constitutional violations established by the retroactive application of new rules. Under that doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Since federal law does not generally permit victims to seek damages from either state agencies (*Will v.*

Michigan Department of State Police, 491 U.S. 58 (1989)), or federal agencies (*FDIC v. Meyer*, 114 S. Ct. 996 (1994)), the effect of the immunity is often to leave them without remedy. *See Wyatt v. Cole*, 112 S. Ct. 1827, 1836 (1992) (Kennedy, J., concurring) ("To cast the issue in terms of immunity . . . is to imply that a wrong was committed but that it cannot be redressed.").[12]

The qualified immunity doctrine rests on the premise that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Thus, the determination of whether a right is "clearly established" for qualified immunity purposes must be based on existing law at the time of the relevant conduct. *See Creighton*, 483 U.S. at 639; *Harlow*, 457 U.S. at 818. The doctrine thus bars damages remedies for constitutional violations established by the retroactive application of subsequent decisions announcing new rules of constitutional law. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 532-36 (1985). And far from being inconsistent with the retroactive application of such decisions, the doctrine is necessary as a remedial limitation precisely because of it. *See American Trucking*, 496 U.S. at 216 n.5 (Stevens, J., dissenting) ("[O]ur whole law of qualified immunity is predicated on the assumption that even 'new' law decisions apply retroactively.").[13]

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[12] Victims may recover damages from responsible municipal agencies, but only where the constitutional violation was caused by an established municipal policy or custom. *See Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[13] In *Wyatt v. Cole*, this Court held that private parties sued under 42 U.S.C. § 1983 are not entitled to raise a qualified immunity defense that includes a right of interlocutory appeal. At the same time, however, five Justices acknowledged that private parties would be entitled to raise a substantively similar good-faith defense (but without a right of interlocutory appeal). *See* 112 S. Ct. at 1836 (Kennedy, J., concurring); *id.* at 1837-39 (Rehnquist, C.J., dissenting).

Similarly, under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court has established a general rule that state prisoners cannot obtain federal habeas corpus relief under a new rule of criminal procedure established after a conviction has become final on direct review. For purposes of *Teague*, a "new rule" is one that was not "dictated" by existing precedent (*id.* at 301) (plurality opinion)) or one that, prior to the decision at issue, would have been "susceptible to debate among reasonable minds." *Butler v. McKellar*, 494 U.S. 407, 415 (1990). *Teague* thus validates "reasonable, good-faith interpretations of existing precedents . . . even though they are shown to be contrary to later decisions." *Id.* at 414.[14]

Justified by the limited remedial nature of federal habeas corpus,[15] *Teague* protects reliance interests similar to those present here. Like private parties, state judges must rely on existing precedent and cannot always predict the future. And, as this Court has explained, "'"[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [subsequent habeas] proceeding, new constitutional commands."'" *Butler*, 494 U.S. at 413-14 (quoting *Teague*, 489 U.S. at 310 (plurality opinion) (in turn quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982))).

2. This Court Has Permitted Delay in the Remedial Implementation of its Own Decrees

Even where prospective remedies are at issue, this Court has permitted delay in the implementation of its own decrees, guided

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[14] The *Teague* doctrine admits only two narrow exceptions: a state prisoner may obtain federal habeas relief if the new rule places his primary conduct beyond the power of the criminal lawmaking authority or if it creates an "absolute prerequisite" of adjudicatory fairness. *See, e.g., Teague*, 489 U.S. at 311-15 (plurality opinion).

[15] *See, e.g., Teague*, 489 U.S. at 305-10 (plurality opinion); *Mackey*, 401 U.S. at 682-95 (Harlan, J., concurring in the judgment); *Desist*, 394 U.S. at 260-65 (Harlan, J., dissenting).

by traditional equitable principles, in order to minimize the disruptive effect of decisions announcing significant new rules of constitutional law.

In *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), the Court held that the use of desegregation remedies to implement its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), would be governed by traditional equitable principles. Citing *Hecht v. Bowles*, the Court explained that equity traditionally "has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. at 300 (footnotes omitted). Thus, recognizing that "additional time" might be "necessary in the public interest," the Court in *Brown II* declined to order immediate compliance with *Brown I*, but only a "prompt and reasonable start toward full compliance" (*id.*), compliance "at the earliest practicable date" (*id.*), and a transition to nondiscriminatory policies "with all deliberate speed" (*id.* at 301). The Court's subsequent decisions, while emphasizing the importance of remediation, likewise recognized possible limitations if the remedies threatened "important and legitimate ends" (*Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979)) or were simply not "practicable" (*Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630, 638 (1991)).

This Court has permitted delay in remedial implementation in other constitutional contexts as well. For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that the broad conferral of adjudicatory power to the bankruptcy courts under the Bankruptcy Act of 1978 violated Article III. The Court declined to disturb past adjudications, however, and it stayed its judgment for over three months in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.* at 88. Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that the Federal Election Commission had been constituted in violation of the Appointments

Clause. However, the Court declined to disturb the Commission's prior acts, and it imposed a "limited stay" of its judgment in order to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement." *Id.* at 143.

3. Applying the *Chevron Oil* Standards, This Court Has Limited the Retrospective Remedies Available in Federal Court For Violations Established by the Retroactive Application of Precedent

Over a wide variety of cases, even outside the statute of limitations context, this Court has applied the principles of *Chevron Oil*, or analogous principles, to limit retrospective relief for violations established by the retroactive application of new decisional law.

In *Lemon II*, for example, the Court invoked traditional equitable principles in holding that states may reimburse sectarian schools for services rendered in violation of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), but provided before *Lemon I* was announced. The Court explained that equity permits consideration of the "practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." 411 U.S. at 201. In applying those principles, the Court stressed both the necessity of reliance on existing law and the fact that a state statute had explicitly authorized the reimbursements at issue. *See id.* at 199 ("[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct"); *id.* at 209 ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful"). *See also Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam) (denying retroactive remedies for pre-decision violations of new rule of Equal Protection); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 214-15 (1970) (same).

This Court has adopted a similar remedial approach where important federal statutory rights are at issue. For example, in

Manhart, this Court held for the first time that even though women on average live longer than men, requiring female employees to make larger annual contributions to a pension fund constituted a violation of Title VII. Nonetheless, the Court declined to award "retroactive relief" for pre-*Manhart* violations. 435 U.S. at 718. Noting that courts "had been silent on the question" prior to *Manhart*, and that "the administrative agencies had conflicting views," the Court reasoned that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful." *Id.* at 720. The Court found "no reason to believe" that retroactive remedies for pre-*Manhart* violations were necessary to ensure future compliance with Title VII (*id.* at 721), and it recognized the substantial unfairness that such remedies would impose (*id.* at 721-22).

Later, when the Court extended *Manhart* from contribution requirements to benefit levels in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), five Justices employed a similar analysis to support the denial of retroactive remedies for pre-*Norris* violations. *See id.* at 1105-07 (Powell, J., concurring in part and dissenting in part); *id.* at 1109-11 (O'Connor, J., concurring). *See also Allen v. State Board of Elections*, 393 U.S. 544, 571-72 (1969) (denying retroactive remedies for newly established Voting Rights Act violation); *Simpson v. Union Oil Co.*, 377 U.S. 13, 25 (1964) (reserving retroactive remedies question for newly established antitrust violation).

Finally, this Court has declined to afford retroactive remedies for pre-decision violations of new procedural rules. For example, in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court held that a litigant forced to proceed in state court under federal abstention must explicitly reserve the right to return to federal court once the state proceedings are completed. However, stressing that the appellants before it had relied on a "mistaken" but not "unreasonable" view of the law as it previously had appeared, the Court held that the dismissal of

their federal action, for failure to make the necessary reservation, was improper. *See id.* at 422-23.

* * * *

In sum, this Court's decisions reveal the widespread permissibility of remedial limitations designed to account for reliance on existing law. Such limitations are universal as a solution to the new law problem in the contexts of qualified immunity and federal habeas corpus. Even where prospective remedies are at issue, remedial limitations are permissible depending on the circumstances of each case. And in the civil retroactivity context specifically, they are permissible with respect to a wide range of constitutional, statutory and procedural violations established through the retroactive application of new law.

In the final analysis, however, this Court need look no further than the remedial holdings of *Chevron Oil* and its progeny. There are only two conceivable distinctions between this case and the *Chevron Oil* line of cases. First, this case involves remedies made available by a constitutional decision of this Court, while the *Chevron Oil* cases involved remedies under decisions construing federal statutes. It is well settled, however, that the remedial and equitable principles on which *Chevron Oil* rests apply with undiminished force in the constitutional context. *See, e.g., Lemon II*, 411 U.S. at 199-206; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Brown II*, 349 U.S. at 300-01.

Second, this case began in state court, while the *Chevron Oil* cases began in federal court. But principles of Due Process restrict both the state and federal courts alike (U.S. Const. Amends. V, XIV), and the state courts generally may afford even greater remedies than those required as a matter of federal law (*see, e.g., Harper*, 113 S. Ct. at 2520). Thus, "it would be wholly anomalous to suggest that federal courts are permitted to determine the scope of the remedy by reference to *Chevron Oil*, but that state courts are barred from considering the equities altogether." *Id.* at 2537 (O'Connor, J., dissenting).

D. *McKesson* and *Reich* Do Not Address the Remedial Issues Present Here

Petitioners bear an extraordinarily high burden to establish that the Due Process Clause requires remedies for constitutional violations established through the retroactive application of new law. As we have demonstrated, the denial of remedies for such violations is widespread and longstanding. And, as this Court has repeatedly recognized, widespread and longstanding practices are not likely to violate the Due Process Clause. *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339 (1994); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991). That principle has even greater force where, as here, the practice at issue has been embraced not only by the political branches, and not only by the common law courts, but by this Court itself.

Petitioners cite only one case, *McKesson*, that discusses the scope of the states' obligation to remedy constitutional violations and, conversely, the permissibility of state-imposed remedial limitations. Pet. Br. 42. That case, however, addressed remedial considerations substantially different from those present here.

In *McKesson*, this Court held that taxpayers compelled to pay an unconstitutionally discriminatory tax, without being afforded a meaningful pre-deprivation opportunity to challenge the tax, must receive a retroactive remedy. *See* 496 U.S. at 36-41. *McKesson*, however, did not address the question of retroactive remedies where new law is at issue. On the contrary, the Court carefully explained that the tax at issue reflected only "cosmetic changes" from, and was "virtually identical" to, a tax that this Court had previously invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *See* 496 U.S. at 46. The Court noted further that the state had not claimed, and could not claim, "surprise" from its ruling. *Id.* at 50. And, in responding to an argument that "equitable considerations" would justify the denial of a retroactive remedy (*id.* at 44), the Court expressly acknowledged that "state interests traditionally have played, and may play, some role in shaping the contours of the relief that the

State must provide to illegally or erroneously deprived taxpayers" (*id.* at 50).

On the date *McKesson* was announced, four Justices confirmed that the Court there "had no occasion to consider the equities of *retroactive* application of new law" — either in a choice-of-law or a remedial sense — "because that case involved only the application of settled Commerce Clause precedent." *American Trucking*, 496 U.S. at 181 (plurality opinion) (emphasis in original). One Term later, Justice Stevens, a fifth member of the *McKesson* Court, joined a sixth Justice who repeated yet again that *McKesson* "did not deal" with the question of "reliance interests entitled to consideration in determining the nature of the remedy that must be provided." *Beam*, 501 U.S. at 544 (opinion of Souter, J.). *See also Harper*, 113 S. Ct. at 2537-38 (O'Connor, J., dissenting) (discussing *McKesson*).

Moreover, *McKesson* addressed the circumstances under which the states must provide retroactive remedies for unconstitutional taxes. The remedial considerations in that context are substantially different from those present here, because the states themselves may impose a wide variety of permissible remedial limitations, to protect themselves against retroactive application of new law, that simply are not available to an individual litigant. To begin with, states may eliminate any possibility of a retroactive liability if they permit taxpayers to challenge the disputed taxes before they are paid. *See McKesson*, 496 U.S. at 38 n.21 ("The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure."). Even if they choose to afford no predeprivation remedy, states may retroactively eliminate unconstitutional discrimination not by refunding the taxes extracted from the disfavored group, but by retroactively increasing the taxes imposed on the favored group, subject only to very modest constitutional limitations. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994); *McKesson*, 496 U.S. at 40 n.23. Finally, states may erect a wide range of procedural barriers, including prompt notice requirements and

short statutes of limitations, that are specifically targeted to taxpayer refund actions. *See id.* at 44-46. None of these options exists for an individual litigant outside the tax refund context, and the need for a *Chevron Oil* limitation is therefore much greater.

For similar reasons, this Court's recent decision in *Reich v. Collins*, No. 93-908 (Dec. 6, 1994), also is not relevant. *Reich* involved claims for tax refunds to remedy constitutional violations established by the retroactive application of *Davis*. This Court addressed only the question whether the Georgia Supreme Court had properly denied retroactive (i.e., post-deprivation) remedies "on the basis of Georgia's predeprivation remedies." Slip Op. at 4. The Court did not address whether remedies could be denied on the alternative ground that *Davis* had established a new rule, a question that evenly divided the four Justices to address it in *Harper*. *Compare* 113 S. Ct. at 2526 (Kennedy, J., concurring in the judgment) *with id.* at 2531-34 (O'Connor, J., dissenting). Nonetheless, the Court's analysis in *Reich* once again confirmed the importance of the kind of reliance interests at stake in this case: "'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.'" Slip Op. 6 (quoting *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958)).

Given this Court's longstanding and repeated practice of limiting the remedies available for violations of law (constitutional and otherwise) established by the retroactive application of new precedents, and given the lack of any authority suggesting that this practice is impermissible, its application by the Ohio Supreme Court in this case cannot possibly violate the Due Process Clause.

III. *BENDIX* ESTABLISHED A NEW CONSTITUTIONAL RULE FOR REMEDIAL LIMITATIONS PURPOSES

In *Chevron Oil*, this Court set forth three considerations for determining whether to limit the remedies available for violations established through the retroactive application of a judicial precedent:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Second*, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Finally*, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted and emphases added). The Ohio Supreme Court correctly concluded that each of these considerations supported its decision not to dismiss pre-*Bendix* complaints.

A. *Bendix* Decided an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed

Petitioners ignore many significant factors that clearly demonstrate the novelty of *Bendix*. First, American law creates a "presumption of constitutionality to which every duly enacted state and federal law is entitled" (*Lockport v. Citizens For Community Action*, 430 U.S. 259, 272 (1977)), which Justice Stewart has characterized as "one of the first principles of constitutional adjudication" (*San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (concurring opinion)). Citizens "are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon II*, 411 U.S. at 208-09. Indeed, at common law, "a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Wyatt*, 112 S. Ct. at 1837 (Kennedy, J. concurring).

Second, in *Bendix* itself, this Court evaluated Section 2305.15 under the balancing test established in *Pike* and restated in *Brown-Forman*. *See* 486 U.S. at 891-95. This balancing process is inherently subjective and unpredictable; it often produces "something of a 'quagmire,'" as this Court candidly has acknowledged. *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914-15 (1992) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)). *See also American Trucking*, 496 U.S. at 201 (Scalia, J., concurring in the judgment). Thus, although *Bendix* ultimately concluded that the "significant" interstate burdens of Section 2305.15 outweighed its "important" local benefits, the only Justice to address a comparable question prior to *Bendix* had concluded that the interstate burdens imposed by New Jersey's substantially more onerous tolling statute were "fairly negligible." *Honda Motor Co. v. Coons*, 469 U.S. 1123, 1126 (1985) (Rehnquist, J., dissenting from denial of certiorari).

Third, *Bendix* followed *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), in which this Court had rejected an Equal Protection challenge to the New Jersey tolling statute. Petitioners trumpet the statement in *Cresco v. Stapf*, 608 A.2d 241, 251 (N.J. 1992), that *Searle* had "indicated that the [New Jersey] tolling statute might run afoul of the Commerce Clause." Pet. Br. 28. But the Commerce Clause question reserved in *Searle* — without comment about its likelihood of success — was substantially different from the one decided in *Bendix*.

The New Jersey tolling statute at issue in *Searle* required an out-of-state corporation not only to appoint an agent for service of process, but also to obtain a business license. *See Coons v. American Honda Motor Co.*, 463 A.2d 921, 923-24 (N.J. 1983), *cert. denied*, 469 U.S. 1123 (1985). The *Searle* petitioners sought invalidation of the New Jersey tolling statute under a line of cases culminating in *Allenberg Cotton Company, Inc. v. Pittman*, 419 U.S. 20 (1974), which established a *per se* rule that the states may not require corporations engaged solely in interstate commerce to obtain a business license in order to gain access to the courts. Thus, the question reserved in *Searle* was whether the

Allenberg rule should be extended to cover cases where corporations engaged solely in interstate commerce must obtain a business license in order to gain protection of the statutes of limitation. *See Searle*, 455 U.S. at 413; *Honda*, 469 U.S. at 1125 (Rehnquist, J., dissenting from denial of certiorari). That question has no conceivable relevance in states like Ohio, where the tolling statute merely requires out-of-state corporations to "appoint an agent for service of process" (*Bendix*, 486 U.S. at 889), and where another statute specifically exempts all *Allenburg*-protected corporations from all applicable licensing requirements (Ohio Rev. Code §§ 1703.02, 1703.03).

Fourth, the fact that *Searle* upheld the New Jersey statute under rational basis review would have further suggested the absence of significant Commerce Clause difficulties where the *Allenburg* line of cases did not apply. For example, in *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), this Court indicated that rational basis review was appropriate only if "no specific federal right, apart from equal protection, is imperiled." Among the "[c]lassic examples" of other such rights, the Court listed "required licenses to engage in interstate commerce" and "taxes that discriminated against . . . interstate commerce." *Id.* at 359 n.3.[16] Also, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 876-77 n.6, 880-81 (1985), the Court suggested that Equal Protection restrictions against burdening out-of-state interests sweep at least as broadly as Commerce Clause restrictions. Thus, the validity of the New Jersey tolling statute against an Equal Protection challenge in *Searle* strongly suggested that, unless *Allenburg* applied, it would pass Commerce Clause muster as well.

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[16] *Lehnhausen*, of course, was merely applying settled principles that "[w]hen a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny" (*Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986)) and that engaging in interstate commerce is a "righ[t] of constitutional stature" (*Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)).

Finally, the Ohio tolling statute on which respondent relied was enacted in its original form in 1810.[17] Before *Bendix* declared it unconstitutional, the Ohio Supreme Court had routinely applied the provision — without hint of constitutional difficulty — for over 175 years.[18] Two judges in the United States District Court for the Southern District of Ohio had published opinions rejecting Equal Protection challenges to the provision — without hint of Commerce Clause difficulty.[19] Nor was the Ohio tolling provision unusual: as of 1974, at least 30 different states had adopted similar provisions.[20]

To overcome the presumption of constitutionality, the absence of any helpful authority from this Court, and the weight of almost

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[17] As originally enacted, the tolling statute provided:

> [W]hen any person or persons against whom there is a cause of action, shall have left the state, and remain out of the state at the same time that such cause of action shall have accrued, or shall have left the state or country, and remain out of the same in a place or places unknown to the person or persons, in whose name such cause of action may exist, at any time during such time as is limited in the foregoing section of this act, the person or persons who shall or may have such a cause of action, shall have liberty to bring his, her or their action or actions against such person or persons, within such time as is limited as aforesaid, after his, her or their return to the state or country.

VIII Acts Passed by the First Session of the Eighth General Assembly of the State of Ohio ch. XVIII, § 2 (1810).

[18] *See, e.g., Seeley v. Expert, Inc.*, 269 N.E.2d 121 (Ohio 1971); *Moss v. Standard Drug Co.*, 112 N.E.2d 542 (Ohio 1953); *Couts v. Rose*, 90 N.E.2d 139 (Ohio 1950); *Commonwealth Loan Co. v. Firestine*, 73 N.E.2d 501 (Ohio 1947); *Title Guaranty & Surety Co. v. McAllister*, 200 N.E. 831 (Ohio 1936).

[19] *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981); *Jatco, Inc. v. Charter Air Center*, 527 F. Supp. 314 (S.D. Ohio 1981).

[20] *See generally* Annotation, 55 A.L.R.3d 1158, 1160-61 (1974) (listing jurisdictions).

two centuries of history, petitioners cite exactly two published decisions — neither of which was ever controlling in Ohio — that invalidated tolling statutes prior to the *Bendix* litigation. Pet. Br. 31. The first case, *Coons v. American Honda Motor Co.*, did nothing more than decide the *Allenberg* question left open in *Searle*. *See* 463 A.2d at 926.[21] Since *Coons* had no occasion to balance under *Pike* the benefits and burdens of a tolling statute that did not require licensing (and thus could survive per-se scrutiny under *Allenberg*), the courts quickly recognized that whether *Coons* could extend to "less burdensome process[es]" remained "an open question." *Turner v. Smalis*, 622 F. Supp. 248, 254 (D. Md. 1985).

That question was addressed, however, in the second case mentioned by petitioners. Although they cite the district court decision in *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983), petitioners fail to note that *McKinley* was reversed on appeal. In holding that the former Idaho tolling statute did *not* violate the Commerce Clause, the Ninth Circuit, citing *Allenburg*, specifically limited *Coons* to tolling statutes that impose licensing requirements on foreign corporations engaged exclusively in interstate commerce. *See McKinley v. Combustion Engineering, Inc.*, No. 84-3505 (9th Cir. Oct. 1, 1984), Slip Op. at 5.

With respect to Ohio precedent, petitioners cite only a single pre-*Bendix* opinion — the *unpublished* district court decision in *Copley v. Heil-Quaker*, No. C-82-512 (N.D. Ohio March 8, 1984). Pet. Br. 29-31. A single unpublished opinion, however, could hardly foreshadow a decision of this Court or establish the unreasonableness of relying on a centuries-old, routinely applied Ohio statute. Moreover, two Ohio unpublished opinions had

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[21] Even the limited Commerce Clause holding of *Coons* was novel enough, in New Jersey, to justify the denial of retroactive dismissals of pre-*Coons* complaints. *See Coons v. American Honda Motor Co.*, 476 A.2d 763 (N.J. 1984); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir. 1986).

upheld Section 2305.15 against Commerce Clause challenge. *See Froug v. A.H. Robins Co.*, No. C-3-80-527 (S.D. Ohio Aug. 4, 1982); *In re Shary Nunley*, No. C-2-80-458 (S.D. Ohio Dec. 1, 1983).[22]

Finally, petitioners argue that the unconstitutionality of Section 2305.15 became clearly foreshadowed in the *Bendix* litigation even before this Court's decision. Thus, petitioners urge that respondent could no longer rely on that provision after June 3, 1987, when the United States Court of Appeals for the Sixth Circuit handed down its *Bendix* opinion invalidating the tolling statute. Pet. Br. 31-32. But this Court did not regard the Commerce Clause issue as settled: it did not summarily affirm the Sixth Circuit's decision, but instead ordered full briefing and argument. Moreover, the Sixth Circuit decision would not govern the Ohio state courts. *See, e.g., Lockhart v. Fretwell*, 113 S.Ct. 838, 846 (1993) (Thomas, J., concurring). Finally, even if the Sixth Circuit decision had resolved the issue, equity still would permit affording respondent a reasonable amount of time *after* the Sixth Circuit decision to learn about the new rule and prepare her lawsuit accordingly. *Cf. Wilson v. Iseminger*, 185 U.S. 55, 62 (1902) (statutes imposing shortened limitations periods must "allow a reasonable time after they take effect for the commencement of suits upon existing causes of action"). Respondent filed her lawsuit on August 11, 1987, barely two months after the Sixth Circuit decision was announced, and exactly three weeks after the decision appeared in the advance sheets of the federal reporter. 820 F.2d 186 (paper ed. July 20,

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[22] Petitioners make no attempt to defend the proposition, asserted by the intermediate appellate court below (Pet. App. A25), that *Title Guaranty & Surety Co. v. McAllister*, 200 N.E. 831 (Ohio 1936), and *Thompson v. Horvath*, 227 N.E.2d 225 (Ohio 1967), "questioned" the constitutionality of the Ohio tolling statute. Those cases neither decided nor addressed any constitutional question.

1987). Respondent's complaint surely was filed within a "reasonable time" under the circumstances.[23]

B. Denial of Retroactive Remedies Will Not Retard the Operation of *Bendix*

The purpose of the *Bendix* rule, like that of dormant commerce clause jurisprudence generally, is to prevent the states from discriminating against or unreasonably burdening interstate commerce. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1349-50 (1994). The Ohio Supreme Court decision, which affects only a closed class of cases involving past transactions, threatens neither of these objectives.

To begin with, denying retroactive remedies for pre-*Bendix* complaints plainly would not even affect, much less burden unreasonably, the present or future conduct of interstate commerce. Prospective defendants remain secure in the knowledge that they may leave Ohio without forfeiting a statute of limitations defense, and prospective plaintiffs now know that

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[23] The cases finding a "reasonable time" under Federal Rule of Civil Procedure 60(b), which permits parties to move for relief from judgments "within a reasonable time," confirm that respondent's complaint readily satisfies any reasonableness standard that might apply. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868-69 (1988) (10 months after judgment entered); *In re Emergency of Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981) (26 months after judgment entered); *Williams v. Capital Transit Co.*, 215 F.2d 487, 489 & 490 n.1 (D.C. Cir. 1954) (three months after judgment entered and three weeks after moving party learned of it); *P.T. Busana Idaman Nurani v. Marissa by GHR Indus. Trading Corp.*, 151 F.R.D. 32, 35-36 (S.D.N.Y. 1993) (two years after judgment entered and two months after moving party learned of it). Moreover, the reasonableness is even more clear in this case because petitioners have claimed no prejudice from any delay, an important consideration in the reasonableness determination. *See Liljeberg*, 486 U.S. at 868-69.

complaints not filed within the applicable limitations period will be dismissed. *Cf. Manhart*, 435 U.S. at 720-21 ("There is no reason to believe that the threat of a [retroactive remedy] is needed to cause other administrators to amend their practices to conform to this decision.").

Moreover, as discussed below, the evenhanded application of *Chevron Oil* inflicts no discrimination that is inimical to Commerce Clause values. Petitioners were denied a dismissal remedy not because of their statuts as out-of-state defendants, but because of the novelty of *Bendix*. Petitioners do not contend that the Ohio courts have invoked *Chevron Oil* selectively in this case, as a pretext for discrimination. Nor could they, since the Ohio appellate courts routinely have applied *Chevron Oil* principles on a neutral basis, regardless of the identitiy of the parties seeking and opposing the remedial limitation.[24]

C. Dismissing Pre-*Bendix* Complaints Would Produce Inequitable Results

Retroactive dismissal under a decision shortening the applicable limitations period is the paradigmatic example of an "inequitable result." *See, e.g., Saint Francis College*, 481 U.S. at 606-07; *Chevron Oil*, 404 U.S. at 105-09. If her complaint should be dismissed, respondent would lose any chance to prove her claim, despite the novelty of *Bendix* and despite her reliance on a tolling statute presumed at the time, as a matter of law, to be constitutional.

Apart from *Chevron Oil* itself, numerous lines of authority confirm the unfairness of retroactively dismissing as untimely a

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[24] *See, e.g., Day v. Hissa*, 1994 Ohio App. LEXIS 4950 (Ct. App. Nov. 3, 1994); *McGowan v. State Auto. Mut. Ins. Co.*, 1993 Ohio App. LEXIS 626 (Ct. App. Feb. 4, 1993); *Wendell v. Ameritrust Co.*, 1992 Ohio App. LEXIS 3834 (Ct. App. July 23, 1992), *aff'd in relevant part and rev'd in part*, 630 N.E.2d 368 (Ohio 1994); *Moore v. National Castings, Inc.*, 1990 Ohio App. LEXIS 5467 (Ct. App. Dec. 14, 1990); *Anello v. Hufziger*, 547 N.E.2d 1220 (Ohio Ct. App. 1988).

complaint that was or appeared to be timely when filed. In a series of older decisions, this Court even held that such dismissals would be unconstitutionally arbitrary. For example, in *Wilson*, 185 U.S. at 62, the Court stated that:

> A statute could not bar the existing rights of claimants without affording this opportunity [to file suit]; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.[25]

Although the modern Court arguably might tolerate such statutes as a constitutional matter, this longstanding concern about arbitrarily extinguishing rights continues to inform the *Chevron Oil* analysis. *See* 404 U.S. at 108 (denying dismissal remedy "simply preserves [plaintiff's] right to a day in court").

Apart from constitutional restrictions, this Court also has vigorously enforced the presumption that statutes do not apply retroactively, because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 114 S. Ct. at 1497. Although statutory retroactivity obviously presents concerns not at issue here, *Landgraf* nonetheless underscores the importance of protecting those who rely on existing law — an objective that the law of remedies is more than flexible enough to accommodate.

On the other hand, petitioners can claim no significant injustice from the denial of a dismissal remedy, notwithstanding their erroneous assertion (Pet. Br. 35) of a constitutional entitlement to

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[25] *See also Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599 (1873). One decision even invalidated a dismissal accomplished through the retroactive application of a judicial decision. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

repose. Although petitioners do have a legitimate interest in not being compelled to defend against stale claims, statutes of limitations still are not fundamental rights, but merely "expedients." *Chase*, 325 U.S. at 314. Respondent filed her complaint in this case less than four years after the accident. Petitioners contend neither that respondent delayed unreasonably nor that they have suffered any prejudice as a result. Thus, petitioners could not even begin to make out a claim under the equitable principles of laches. *See generally* D. Laycock, *Modern American Remedies* 964-68 (1985). Moreover, since *Bendix* established new law, the Ohio Supreme Court decision merely prevents petitioners from obtaining a windfall that they could not have expected when respondent began this lawsuit.

Finally, petitioners would have acquired only a limited expectation of repose even if they could have anticipated *Bendix* before respondent filed her complaint. A forum state typically applies its own statutes of limitations in its own courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). Thus, even after the Ohio limitations period had run, petitioners could have been sued in any other forum (subject to personal jurisdiction constraints) with a limitations period of four or more years, or a constitutional tolling provision.[26]

IV. PETITIONERS RAISE NO CONSTITUTIONAL CLAIM BASED ON AN ANTIDISCRIMINATION PRINCIPLE

Petitioners do not contend that the decision below to deny retroactive remedies was a pretext for discrimination on any constitutionally impermissible basis. If the Ohio Supreme Court had selectively invoked *Chevron Oil* in this case because petitioners are out-of-state defendants, or because petitioners are engaged in interstate commerce, then its denial of a remedy

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[26] This Court's own cases confirm that this possibility is far from hypothetical. *See, e.g., Ferens v. John Deere Co.*, 494 U.S. 516, 519-21 (1990); *Sun Oil*, 486 U.S. 717; *Keeton v. Hustler Magazine*, 465 U.S. 770, 778-79 (1984).

presumably would constitute a violation of the Commerce Clause independent of the violation established by the retroactive application of *Bendix*, since the Commerce Clause prohibits such discrimination almost categorically. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 149 & n.19 (1986); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Similarly, if the Ohio Supreme Court had selectively invoked *Chevron Oil* in this case because petitioners were asserting federal rights as opposed to state rights, then its denial of a remedy arguably would violate the antidiscrimination principle established in *Howlett v. Rose*, 496 U.S. 356, 372-81 (1990), and *Testa v. Katt*, 330 U.S. 386, 389-94 (1947), which requires state courts to entertain (and perhaps remedy) federal claims if they would entertain analogous state claims.

A proper rejection of petitioners' Due Process argument would not foreclose challenges to the denial of a remedy, in future cases, based on such antidiscrimination principles. In this case, however, petitioners have not raised such arguments. And in any event, it is clear that they would be without merit. *See supra* note 24 and accompanying text.

CONCLUSION

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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December 13, 1994

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

In *Harper v. Virginia Dept. of Taxation*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. This Court also declared that henceforth it would not permit the erection of selective barriers to the application of federal law in civil cases. In denying to Petitioners the retroactive application of *Bendix*

Autolite Corp. v. Midwesco Enterprises, Inc., by claiming that state courts could tailor their own remedies as they determined the manner in which a United States Supreme Court opinion was to be retroactively applied, the majority engaged in conduct that was clearly prohibited by *Harper v. Virginia Dept. of Taxation*, that being the erection of a barrier to the application of federal law.

The instant case presents no issues of remedy. The only issue is whether new law or old law applies to Respondent's personal injury action. Petitioners seek no remedy from the Courts for the violation of a novel constitutional rule. Having conceded that the rule of law set forth in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applied to her action, Respondent is not entitled to any relief from this Court.

Although giving lip service to *Chevron Oil Co. v. Huson* as being "good law", it is clear that the Ohio Supreme Court thought to the contrary in light of its very limited analysis and application of the *Chevron Oil Co. v. Huson* factors. The "state grounds" upon which the Ohio Supreme Court presumably based its decision (Pet. App. A6-A10) have been conceded by the Respondent as being in error. (Res. Br. 4). Furthermore, although Respondent claimed substantial injury from the accident of March 5, 1984, suit was not filed until August 11, 1987, long after Respondent knew or should have known that O.R.C. §2305.15 had been declared unconstitutional.

ARGUMENT

I. *Harper v. Virginia Dept. of Taxation* Does Not Allow State Courts to Tailor Their Own Remedies as They Determine the Manner in Which a United States Supreme Court Opinion Is to Be Retroactively Applied.

The parties are today in agreement on certain of the issues present herein as well as passed upon by the Ohio Supreme Court. At the outset, there is agreement that *Harper v. Virginia Dept. of Taxation* established a clear rule of law that stated:

> ". . . When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."

125 L.Ed.2d 86 (Res. Br. 8).

Furthermore, there is agreement that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* retroactively invalidated O.R.C. §2305.15 (Res. Br. 8). Likewise, there is no question that *Harper v. Virginia Dept. of Taxation* overruled *Chevron Oil Co. v. Huson* to the extent that *Chevron Oil Co. v. Huson* rested on a choice-of-law rationale (Res. Br. 9).

It is equally clear that the third branch in support of the Ohio Supreme Court's ruling, *i.,e.,* when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the U.S. Constitution, such as retroactivity, the state civil right prevails, was in error. Today, Respondent agrees

with Justice Thomas' admonition that the Supremacy Clause to the U.S. Constitution does not allow the federal retroactivity doctrine to be supplemented by the invocation of a contrary approach to retroactivity under state law (Res. Br. 4).

In *James B. Beam Distilling Co. v. Georgia* this Court declared that the *Chevron Oil Co. v. Huson* test could not determine choice-of-law by relying on the equities of the particular case. 115 L.Ed.2d 493. Accordingly, following the decision in *James B. Beam Distilling Co. v. Georgia*, if *Chevron Oil Co. v. Huson* had any continued vitality, it was only in the very limited context of a remedy analysis. However, as stated by Justice Souter:

> "Once a rule is found to apply 'backward', there *may* then be the further issue of remedies. . ." (Emphasis supplied).

115 L.Ed.2d 481. Conversely, as reflected in the instant case, there may not be an issue of remedies.

Whatever vitality *Chevron Oil Co. v. Huson* may have had following *James B. Beam Distilling Co. v. Georgia* was put to rest when this Court decided *Harper v. Virginia Dept. of Taxation.* In *Harper v. Virginia Dept. of Taxation,* Justice Thomas stated that:

> ". . . we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases"

125 L.Ed. 87.

The continued use of *Chevron Oil Co. v. Huson,* in the context of a remedy analysis, is nothing more than an attempt to avoid the clear prohibition of *Harper v. Virginia Dept. of Taxation* regarding the erection of barriers to the application of federal law in civil cases.

It is conceded by Respondent that *Harper v. Virginia Dept. of Taxation* compels the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (Res. Br. 10). *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided on the basis of a violation of the Commerce Clause to the U.S. Constitution, clearly an issue involving federal law in the civil arena. As stated in *Rivers v. Roadway Express*:

> "It is this Court's responsibility to say what a statute means, and once it has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authorative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."

128 L.Ed.2d 289.

As a result of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation,* any resort to a *Chevron Oil Co. v. Huson* analysis will serve only to render meaningless the clear prohibition against the erection of selective barriers to the full application of federal law in the civil arena. As such, Respondent's argument that *Harper v. Virginia Dept. of Taxation* left undisturbed the remedial aspects of *Chevron Oil Co. v. Huson* is clearly contra to the holding in *Harper v. Virginia Dept. of Taxation.*

Following *Harper v. Virginia Dept. of Taxation,* what, if anything, was left of *Chevron Oil Co. v. Huson* after *James B. Beam Distilling Co. v. Georgia* was, as stated in the dissent of Justice O'Connor, abandoned. 125 L.Ed.2d 97. In commenting upon the demise of *Chevron Oil Co. v. Huson,* Justice Scalia, in concurring in *Harper v. Virginia Dept. of Taxation,* stated:

"2. Contrary to the suggestion in the dissent, I am not arguing that we should 'cast overboard our *entire* retroactivity doctrine with . . . [an] unceremonious heave-ho.' Post, at _____, 125 L Ed 2d, at 99 (emphasis added; internal quotation marks omitted). There is no need. We cast over the first half six Terms ago in Griffith, and deep-sixed most of the rest two Terms ago in James B. Beam Distilling Co. v. Georgia, 501 US _____, 115 L Ed 2d 481, 111 S Ct 2439 (1991)—in neither case unceremoniously (in marked contrast to some of the overrulings cited in text). What little, if any, remains is teetering at the end of the plank and need no more than a gentle nudge. But if the entire doctrine had been given a quick and unceremonious end, there could be no complaint on the grounds of stare decisis; as it was born, so should it die."

125 L.Ed.2d 94, 95.

While the majority of the Ohio Supreme Court was correct in alluding to the fact that *Harper v. Virginia Dept. of Taxation* had replaced the *Chevron Oil Co. v. Huson* test (Pet. App. A6), it was incorrect in its application of *Harper v. Virginia Dept. of Taxation.* To the extent that state court "tailored remedies", or what might also be called "selective temporal barriers", stand in the way of the full application of federal law in civil cases, such "tailored remedies" must fail. Just as the majority's reliance upon the Ohio Constitution (Pet. App. A7) was in error, so also was its conclusion that *Harper v. Virginia Dept. of Taxation* allowed state courts to tailor their own remedies as they determined the manner in which a U.S. Supreme Court opinion was to be retroactively applied.

II. Remedy Doctrines Are Not Applicable Herein. The Only Issue Is Whether New Law or Old Law Applies to Respondent's Personal Injury Action.

As previously noted, Respondent has made several concessions that signal abandonment of the decision of the Ohio Supreme Court (Res. Br. 4, 8, 9, 10). Despite Respondent's additional concession that "very different remedial considerations" apply in tax refund cases (Res. Br. 7), Respondent essentially asks this Court to adopt the reasoning of Part III of Justice O'Connor's dissent in *Harper v. Virginia Dept. of Taxation.* 125 L.Ed. 97, But Respondent goes much further than Justice O'Connor by arguing for the application of the doctrine of constitutional remedies in a case in which the issue of remedies never arises. Respondent's recasting of the facts, the law and Petitioners' argument cannot obscure the extraordinary nature of the relief Respondent seeks. Respondent asks this Court not only to provide "remedies" to parties who have suffered no constitutional insult, but to permit "remedies" that require the enforcement of an unconstitutional statute.

A. "Remedies" Are Not at Issue in This Case, Where There Was No "Victim of a Constitutional Violation".

The doctrine of constitutional remedies seeks to provide "effective redress to individual victims of a constitutional violation". Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 Harv. L. Rev. 1731, 1736. As with any other form of remedy, the doctrine of constitutional remedies comes into play only when a duty has been breached, resulting in damages. In the context of tax refund

litigation, the doctrine requires states to provide an adequate remedy for taxpayers compelled to pay taxes under an unconstitutional statute. *See, generally, Reich v. Collins*, 63 U.S.L.W. 4032. The remedy for those damages may[1] vary according to whether the breach was determined in hindsight, on the basis of an unforeseeable change in the law.

Here, no remedy was sought by, or granted to, a "victim of a constitutional violation". Remedy doctrines are therefore irrelevant.

In the trial court, Petitioners moved to dismiss Respondent's Complaint as untimely. Respondent opposed the motion, claiming that her action was "saved" by O.R.C. §2305.15. While the motion was pending, this Court determined that O.R.C. §2305.15 was unconstitutional. That ruling applied to Respondent's pending case—not as a "remedy" for Petitioners, but as a controlling federal precedent.

The effect of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was to eliminate Respondent's defense to the motion to dismiss. The only remaining applicable statute was Ohio's two-year statute of limitations for personal injuries. Since that statute had expired, Respondent had no cognizable claim as a *matter of law*, not on the grounds of equity or remedy.

In the Ohio Supreme Court, Respondent argued that her "reliance" on O.R.C. §2305.15 entitled her—the potential *beneficiary* of an unconstitutional statute—to a "remedy" in the form of selective prospectivity. The Ohio Supreme Court agreed and this Court accepted jurisdiction.

[1] Because "remedy" is irrelevant, this Court need not consider when, if ever, equitable considerations will influence the remedy available for constitutional torts.

Respondent now tries to recast the case and Petitioners' argument by claiming that Petitioners sought and were denied a "remedy" for a constitutional violation. Petitioners asserted no cause of action based upon conduct that was lawful at the time the tort was committed. Petitioners paid no unconstitutional tax. Petitioners simply asserted that Respondent's claim was time-barred and O.R.C. §2305.15 did not save it.

Contrary to Respondent's assertions, Petitioners do *not* argue before this Court that their "Due Process" rights were violated by the Ohio Supreme Court's refusal to grant Petitioners a remedy for a constitutional violation.[2] Rather, Petitioners argue that the Ohio Supreme Court improperly granted Respondent the "remedy" of selective immunity from the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The doctrine of constitutional remedies applies only to aggrieved parties seeking redress for constitutional violations after prevailing on the constitutional question. Even Justice O'Connor believes only that courts should be given:

[2] Respondent cites to pp. 41-43 of Petitioners' Brief for this mischaracterization of Petitioners' argument. *Nowhere* on those pages do Petitioners claim a Due Process violation. Respondent bases an entire section of her Brief (Res. Br. at 28-30) on the false assertion (Res. Br. at 28) that Petitioners cite *McKesson v. Div. of Alc. Bev.* on p. 42 of their Brief to discuss "the permissibility of state-imposed remedial limitations". Page 42 of Petitioners' Brief merely points out that the Ohio Supreme Court's opinion constitutes "the wrongful validation of an unconstitutional statute under the guise of '. . . fashioning appropriate relief.' " *Harper v. Virginia Dept. of Taxation*—not *McKesson v. Div. of Alc. Bev.*—is cited in support.

"... the ability to avoid injustice by taking equity into account when formulating the remedy for *violations* of novel constitutional rules." (Emphasis supplied).

125 L.Ed.2d 112.

This case presents only the issue of whether new law or old law applies to Respondent's personal injury action. Petitioners seek no remedy from the courts for the violation of a novel constitutional rule. Having conceded that the rule of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* applied to her action, Respondent is entitled to no relief from this Court.

B. Selective Prospectivity Is Not a Viable Form of Remedy.

The Ohio Supreme Court found Respondent and a select group of Ohio citizens to be immune from the rule of law established by this Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Even if this were a case that invoked "remedies", the Ohio Supreme Court's choice of selective prospectivity as a remedy (or a "limitation" of remedy) should be reversed.

In her dissent to *Harper v. Virginia Dept. of Taxation,* Justice O'Connor implicitly acknowledged that the "remedy" she advocated was inseparable from "choice of law". To deny the taxpayers relief for their claim of a constitutional violation, courts would either have to go back and hold that *Davis v. Michigan Department of the Treasury* applies prospectively only, or condone the practice of selective prospectivity. *Harper v. Virginia Dept. of Taxation* (Justice O'Connor, dissenting) at 125 L.Ed.2d 112 (because "the Constitution permits this

Court to refuse plaintiffs full backwards-looking relief", state courts should have the same leeway). The majority of this Court, however, firmly rejected the doctrine of selective prospectivity; it cannot be revived under the guise of "remedy".

C. Other Remedy Doctrines Are Irrelevant.

Implicitly recognizing that this case is not about the doctrine of constitutional remedies, Respondent argues a slew of "analogous" doctrines—some related to different kinds of constitutional issues and some related to how states and the common law create and apply statutes of limitations. None are relevant.

This case is not concerned with the effect of constitutional rulings on consummated transactions. Even if it were, the Ohio Supreme Court did not adopt an equitable remedy that would mitigate the harsh consequences of the new rule. It did not, for example, order rescission of a newly invalidated contract over money damages. Here, the Court below simply refused to apply the new law.

Nor is this case about equitable tolling doctrines, waiver, estoppel or laches. All of those doctrines are based on equity's refusal to aid a wrongdoer. Here, the conduct of the parties is not at issue. The only issue is the applicability of "new law".

Finally, this case does not involve a *legislature's* right or ability to pass statutes that revive expired limitations periods. Legislatures create, repeal and revive statutes of limitations. Courts simply interpret, invalidate or enforce them.

In sum, Respondent can present no authority to support the judgment of the Ohio Supreme Court. It is not a matter for a remedy, because there are no aggrieved parties seeking redress for violation of their constitutional rights. It is not about protecting previously immune public officials from personal liability for "new" constitutional torts, delaying the effective date of injunctive relief to give school systems time to formulate a desegregation plan, or determining whether *Chevron Oil Co. v. Huson* factors will continue to be relevant under the doctrine of pure prospectivity.

This case is about whether Ohio courts can refuse to apply controlling federal law to a select group of citizens who allegedly "relied" on an unconstitutional statute. This case asks the question of whether state courts can invoke "equity" or "remedy" as a basis for enforcing statutes that violate the Commerce Clause. They cannot.

III. At the Time of Filing Her Complaint, Respondent Knew or Should Have Known That O.R.C. §2305.15 Was Unconstitutional.

Respondent has devoted considerable effort to justify why the three tests discussed in *Chevron Oil Co. v. Huson* have applicability herein, something that the Ohio Supreme Court failed to do when it passed upon the identical issue. Although Respondent argues that the Ohio Supreme Court correctly concluded that each of the *Chevron Oil Co. v. Huson* tests supported its decision (Res. Br. 31), it is clear from the record that the majority's efforts were quite limited (Pet. App. A6).

The Ohio Supreme Court's somewhat skeptical view of *Chevron Oil Co. v. Huson* was evident when it stated:

> "Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision."

Pet. App. A6.

In commenting upon the majority's analysis and subsequent reliance upon *Chevron Oil Co. v. Huson*, the dissent correctly stated:

> "It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

Pet. App. A10.

The "state grounds" referenced by the dissent (Pet. App. A6-10) have been conceded by the Respondent as being in error (Res. Br. 4).

Respondent and/or her counsel knew or should have known that the U.S. District Court for the Northern District of Ohio, Western Division, March 5, 1984, and the U.S. Court of Appeals for the Sixth Circuit, June 3, 1987, had declared Ohio's tolling statute unconstitutional. As such, there can be no realistic "justifiable reliance" upon a statute that had been declared unconstitutional. Furthermore, the case precedent relied upon by the Respondent ends with the year 1983 (Res. Br. 34, 36). *Copley v. Heil-Quaker* was decided on March 8, 1984 whereas the U.S. Court of Appeals for the Sixth Circuit's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was rendered on June 3, 1987. Respondent's Complaint was not filed until August 11, 1987.

CONCLUSION

For the reasons advanced herein, Petitioners respectfully request this Court to reverse the decision of the Ohio Supreme Court and to enter final judgment in favor of Petitioners.

Respectfully submitted,

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(8)

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE DALKON SHIELD CLAIMANTS TRUST IN SUPPORT OF PETITIONERS

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MOTION TO APPEAR AS *AMICUS*

The Dalkon Shield Claimants Trust ("Trust") respectfully requests leave to appear as *amicus curiae* in support of Petitioner on the appeal of the merits of this matter.

On October 3, 1994, this Court granted the Trust's motion for leave to file as *amicus* in support of the petition for writ of certiorari. The Petitioner had consented to such participation; Respondent had refused consent. Pursuant to Supreme Court Rule 37.3, the Trust again requested all parties to agree, in writing, to the Trust's participation as *amicus curiae*. *See* Exh. A, attached. Petitioner gave such consent (*see* Exh. B, attached); Respondent refused. The same reasons that supported the Trust's appearance as *amicus* on the petition, summarized below, support its appearance as *amicus* on the merits of the appeal.

Three *amici* appeared on Respondent's behalf in the Ohio Supreme Court. Although the individual facts of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994), involve a traffic accident, those *amici* presented the case as potentially barring hundreds of lawsuits filed in Ohio by Ohio residents allegedly injured by their use of a Dalkon Shield intrauterine device ("IUD"). The 28-page brief filed by *amicus curiae* Brown & Szaller Co., L.P.A., claimed to speak on behalf of "350 clients" with Dalkon Shield claims within the state. The Ohio Academy of Trial Lawyers filed a 44-page *amicus* brief on behalf of numerous plaintiffs, "including multiple Dalkon Shield Litigants." The law firm of Spangenberg, Shibley, Traci, Lancione & Liber also filed a lengthy *amicus* brief on behalf of women in Ohio with claims pending against the

Dalkon Shield Claimants Trust. The two law firm *amici* strenuously argued that their clients had "relied on" pre-*Bendix* law to decide "when" to file suit against A.H. Robins, and would be harmed by the retroactive application of *Bendix*. They also filed "reply briefs," and counsel from Brown & Szaller presented the oral argument in the Ohio Supreme Court on behalf of Respondent.

Having sought—or at least consented to—the participation of three *amici* in the Ohio Supreme Court, Respondent cannot now claim to have a reasonable basis for refusing to consent to *amicus* participation by the Trust in the United States Supreme Court. By permitting a Dalkon Shield Claimants attorney to present oral argument in the Ohio Supreme Court, Respondent has clearly conceded that this is not a case only about two individuals in an automobile accident. The issues herein have a much broader implication, and especially to Dalkon Shield Claimants and the Trust. Entities representing those interests present a unique and helpful perspective to this Court.

The Trust therefore renews its motion for leave to appear as *amicus*—a motion granted at the petition stage—and leave to file the attached proposed *amicus* brief in support of Petitioner.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

May the Ohio Supreme Court refuse to follow the rule of law established by this Court in 1988 when this Court determined that Ohio's tolling statute was unconstitutional and that rule of law was applied to the parties before the Court?

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No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

AMICUS CURIAE BRIEF OF THE DALKON SHIELD CLAIMANTS TRUST IN SUPPORT OF PETITIONERS

I. INTEREST OF THE *AMICUS*

This Brief is submitted on behalf of the Dalkon Shield Claimants Trust ("Trust"). The Trust was established to administer and distribute a limited fund to compensate users of the Dalkon Shield intrauterine device ("IUD") for injuries suffered as a result of its use.

The Trust has a compelling interest in the decision below, which deprives the Trust of its statute of limitations defense in Ohio. The effect of the Ohio Supreme Court's decision is to encourage litigation over the carefully crafted claims resolution procedures followed by the Trust. Those procedures provide fair and equitable compensation to claimants with a mechanism which favors settlement over arbitration and litigation, thereby reducing transactional costs and preserving Trust assets for the benefit of deserving claimants.

By failing to apply controlling U.S. Supreme Court precedent, the Ohio Supreme Court has given Ohio's unconstitutional tolling statute new life. In so doing, the Ohio Court encourages the depletion of Trust funds through litigation by Ohio claimants. A brief background of the Trust will illustrate the adverse and discriminatory impact of *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994).

A. The Dalkon Shield Claimants Trust and Claims Resolution Facility.

A.H. Robins, manufacturer of the Dalkon Shield IUD, filed for bankruptcy in 1985, on the heels of thousands of lawsuits filed by Dalkon Shield IUD users. During the pendency of that bankruptcy, some 197,000 persons (hereafter "Dalkon Shield Claimants") filed claims. All claims filed with the bankruptcy court prior to April 30, 1986, were declared "timely" for bankruptcy purposes.

A plan of reorganization ("Plan"), was confirmed in 1988, and consummated in 1989.[1] The Plan called for a unique approach to compensate as many claimants as possible through a $2.23 billion fund administered by the Trust. The fund was for the sole benefit of the Dalkon Shield Claimants—any funds remaining after the payment of claims and administrative expenses "will be distributed pro rata to claimants . . . ." *In re A.H. Robins, Inc.*, 880 F.2d 769, 771 (4th Cir. 1989).

The Plan seeks to maximize individual compensation through an innovative claims resolution process. Specifically, the Plan established a Claims Resolution Facility ("CRF"), implemented by the Trust's five Trustees, that favors dispute resolution mechanisms with the lowest transactional costs. *See* Exhibit 4 to the Plan, attached hereto as Exh. C.

[1] A summary of the proceedings and Plan is set forth in *In re A.H. Robins Co., Inc.*, 88 B.R. 742 (E.D. Va. 1988) and 88 B.R. 755 (E.D. Va. 1988), and appellate decisions of that same name, 880 F.2d 694 (4th Cir. 1989); 880 F.2d 709 (4th Cir. 1989); and 880 F.2d 769 (4th Cir. 1989).

The CRF's four-pronged directive drives every decision underlying the Trust's claims review process:

> 1. Provide an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs;
>
> 2. Provide claimants with an attractive alternative to trial by jury where settlement is not achieved;
>
> 3. Provide fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield; and
>
> 4. Provide no compensation to persons not injured by the Dalkon Shield.

Exh. C, p. C1, §A. These guidelines seek to provide fair and equitable compensation in an efficient mechanism which reduces transaction costs.

B. The Compensation Options for Dalkon Shield Claimants Across the Nation and in Ohio.

Consistent with the above guidelines, the CRF provides all Dalkon Shield Claimants with three[2] "options" for obtaining compensation. Option 1 provides a fixed payment for *de minimis* claims. Option 2 provides payment for more serious injury according to a schedule, without requiring proof of medical causation. Option 3 provides a detailed, individualized evaluation by the Trust of claims supported by medical records and evidence of medical causation to produce an offer of compensation to the

[2] A fourth "option" permits a Claimant to defer consideration of his or her claim without waiving any right to that claim.

Claimant for all injuries caused by the Dalkon Shield IUD. There is no minimum or maximum award in this category—every Option 3 claim is accorded "fair and equitable compensation, based upon historic values, updated by current developments . . . ." Exh. C, p. C1, §A.

A Claimant who is dissatisfied for whatever reason with her Option 3 offer may choose among a number of dispute resolution mechanisms. An Alternative Dispute Resolution ("ADR") procedure is designed to provide an expedited hearing (not to exceed several hours in length) before a neutral evaluator appointed by the Private Adjudication Center, Inc., affiliated with the Duke University School of Law. In ADR—which has a $20,000 ceiling—the Trust is not represented by counsel, may not assert any statute of limitations defense, and product defect is not an issue.

A dissatisfied Option 3 Claimant may also choose the alternative of Arbitration before an appointed neutral arbitrator. At Arbitration—which has no monetary ceiling—the parties may be represented by counsel, but the Trust cannot contest product defect. However, a three-year limitations period is specified by the governing Arbitration Rules.

Finally, for Option 3 Claimants who so choose, traditional litigation may be pursued in the applicable state or federal court. The Trust may raise all available defenses in such litigation, including absence of product defect and the statute of limitations of the appropriate jurisdiction.

To date, the Trust has paid 118,943 Option 1 claims and 13,732 Option 2 claims. Over 92 percent of all Option 3 claims have been reviewed. Of the Option

3 Claimants whose claims have been reviewed, 92 percent have accepted the proposed payment or moved to ADR. Compensation payments for Options 1, 2, and 3 total over $1.2 billion to 165,915 Claimants.

C. The Effect of *Bendix* on Ohio Dalkon Shield Claimants.

As noted, all claims against A.H. Robins filed with the Bankruptcy Court prior to April 30, 1986, were declared "timely" for bankruptcy purposes by the United States District Court for the Eastern Division of Virginia—whether or not there was an arguable statute of limitations defense. All of these claims were therefore eligible for the CRF's multi-faceted claims resolution procedures.

Further, in an effort to encourage voluntary claim resolution over litigation, the CRF was promulgated and implemented in such a way as to ensure that *all* of these claims could be compensated without any consideration whatsoever as to whether the claim was timely from a limitations standpoint. For example, the Trust cannot consider or assert the defense of the statute of limitations against a Claimant who chooses Option 1 or 2. Nor is such a defense asserted against a Claimant or accorded any weight during the individualized evaluation process of Option 3 claims. The Trust asserts the Ohio statute of limitations *only* after an Ohio Claimant has rejected the Trust's Option 3 best and final settlement offer, *and* has rejected alternative dispute resolution mechanisms put in place to avoid costly litigation in the state and federal court system.

All Ohio Claimants' counsel who rejected Option 3 offers did so long after this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (hereinafter "*Bendix*"). All Ohio Claimants' counsel who chose costly litigation over claims resolution did so knowing that the Trust could and would assert all available defenses—including the statute of limitations. Presumably, numerous counsel advised their Ohio clients to accept the Option 3 settlement offers, or pursue alternate dispute resolution, because the Trust could assert the Ohio statute of limitations in any litigation against it and the Claimant would not be able to rely on the tolling statute determined by this Court to be unconstitutional in 1988.

II. SUMMARY OF ARGUMENT

The decision on review contains two holdings. The first holding stems from the Ohio Supreme Court's erroneous conclusion that the prospective/retroactive application of *Bendix* is a matter of first impression for it to decide. The court then exercises its presumed power by holding that this Court could and would embrace the rejected doctrine of selective prospectivity. In the second part of its opinion, the Ohio Supreme Court holds, in the alternative, that the retroactive application of *Bendix* does not require a dismissal of Respondent's claims. Specifically, the court's majority holds that it can "tailor" a "remedy" from the Ohio Constitution that will shield Respondent from the dismissal mandated by *Bendix*.

The Ohio Supreme Court's first holding is in direct conflict with *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed. 2d 74 (1993) (hereinafter "*Harper*"), where this Court held: 1) if a new rule is applied to the parties before the Court, the decision is to be applied retroactively thereafter to all pending cases and events; and 2) selective prospectivity is no longer a viable option for judicial rulings.

The second part of the Ohio Supreme Court decision violates the Supremacy Clause of the United States Constitution. The power to dictate that a decision will be applied retroactively is a necessary corollary to the power to interpret the United States Constitution. States may neither ignore nor evade federal retroactivity rules, either by applying the state's own doctrine of retroactivity, or by citing contrary provisions of the state's constitution.

III. ARGUMENT

A. When This Court Has Applied a Decision to the Parties Before It, a State Supreme Court Has No Power to Determine that the Decision May Be Selectively Applied to Its Own Citizens.

The issues corresponding to the first part of the decision below are: 1) does *Bendix* leave the issue of retroactivity open? and 2) may *Bendix* be applied selectively on the basis of individual equities? Recent decisions from this Court answer both questions in the negative.

1. This Court did not "reserve" the issue of retroactive application in *Bendix*.

The Ohio Supreme Court majority assumed that because this Court "specifically declined to determine" whether its ruling in *Bendix* "should be applied prospectively only," it was up to the Ohio court to take on "the task of determining whether the *Bendix* decision is to be applied retroactively." Pet. App. at A4. The Ohio court misperceived its task. Because this Court applied the rule of *Bendix* to the parties before it, the retroactivity decision has already been made.

In *Bendix*, this Court refused to consider the petitioner's argument that its ruling should be applied prospectively only, because the issue was not preserved below. This Court then applied its ruling to the parties before it, affirming the decision of the Sixth Circuit, which in turn affirmed the District Court's grant of summary judgment in favor of the out-of-state defendant manufacturer. Thus, the petitioner's claims were barred by the statute of limitations and Ohio's tolling statute would not apply to save those claims.

The issue of retroactive application only remains open when this Court specifically reserves the question of " 'whether its holding should be applied *to the parties before it . . . .*' " *Harper*, 113 S.Ct. at 2518 (emphasis supplied), *quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (hereinafter "*Beam*"). This Court did not reserve the question of whether its holding should be applied to the parties before it in *Bendix*—it applied its holding to the parties before it. Therefore, *Bendix* must be applied retroactively to all cases, regardless of whether the events of those cases predate the announcement of the rule.

This "bright line" rule is both workable and certain. It does require counsel to raise the issue of prospective application at the earliest opportunity in order to avoid the presumptive retroactive application of the rule announced. But exacting such a duty is a small price for the uniformity and judicial efficiency gained.

In the absence of the *Harper* rule, state and federal courts are left to speculate on the proper application of federal principles of retroactivity in all decisions in which this Court is silent on the issue. Courts understandably reach different conclusions, leading to disparate applications by different courts. This Court then must revisit its original decision, as in *Beam* and *Harper*, to determine which courts had guessed correctly. A bright line rule supports uniformity and efficiency. The rule is further supported by sound jurisprudential principles, as explained below.

2. "Selective prospectivity" may not be applied to decisions of this Court.

The Ohio Supreme Court further erred by resolving the issue of retroactivity according to the doctrine of selective prospectivity approved in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (hereinafter "*Chevron Oil*"). This Court reversed state supreme court decisions in *Beam* and *Harper* precisely because those courts performed a *Chevron Oil* analysis. It is no more proper here than it was in those cases.

The doctrines of pure prospectivity and selective prospectivity represent deviations from jurisprudence of "near a thousand years" that judicial decisions must be applied retroactively. *Harper*, 113 S.Ct. at 2516, *quoting*, *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting). According judicial decisions retroactive effect is based on courts' fundamental duty " 'to say what the law *is*,' . . . not what the law *shall be*." *Harper*, 113 S.Ct. at 2523, *quoting*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

Selective prospectivity does not even pronounce what the law "shall be." Instead, that doctrine applies the new rule to the parties before the court, but allows other courts to determine whether to apply the new rule according to an individual party's reliance on the old rule. In other words, it permits " 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of a new rule." *Harper*, 113 S.Ct. at 2517, *quoting*, *Beam*, 501 U.S. at 543.

First in *Beam*, and more emphatically in *Harper*, a majority of this Court abandoned selective prospectivity and required the retroactive application of judicial rules that are applied to the parties before this Court:

> When this court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule.

Harper, 113 S.Ct. at 2517.

Again this year, this Court reiterated that selective prospectivity violates "the rules that necessarily govern our hierarchical federal court system." *Rivers v. Roadway Express*, _____ U.S. _____, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (1994) (cite omitted). When this Court definitively construes or strikes down a statute—as it did in *Bendix*—it declares what the statute has always meant, and how it should have been applied from the date of enactment:

> It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Id. (footnote omitted). The footnote further explains that a decision of this Court does not "change" previously prevailing law from appellate courts, it

simply decides what the statute had *always* meant and explains why lower courts had misinterpreted the statute. *Id.*, n.12.

This definitive interpretation requires the dismissal of pending or accrued claims that were filed in reliance on an invalid or misconstrued statute. Such dismissals are not based on "fairness" principles, but represent risks that are inherent to the judicial system:

> The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.

Id. (citation omitted).

Bendix did not overrule any previous decision of this Court.[3] It simply held that Ohio's tolling statute had always been a violation of the Commerce Clause, contrary to what any state and federal court of appeals may have previously stated. The "crucible" of litigation produced a decision from the highest authority in our judicial system that Ohio's tolling statute impermissibly burdened interstate commerce. Sound jurisprudence requires state and federal courts to apply that authoritative statement to all pending cases and previously occurring events.

---

[3] To the contrary, *Bendix* had been foreshadowed six years earlier. In 1982, this Court "decline[d] to resolve" a Commerce Clause challenge to a similar New Jersey tolling statute because the issue had not been addressed below. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 413, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982). But two justices urged consideration of the Commerce Clause challenge, noting its "considerable force." 455 U.S. at 420 (Powell, dissenting in part).

B. The Supremacy Clause Requires States to Apply Constitutional Rulings of This Court, Even if such Application Contravenes the State's Constitution.

In the second part of its opinion, the Ohio Supreme Court held that "[e]ven if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible." Pet. App. at A6. This holding is based on the court's improper assumptions that: 1) *Harper* allows state courts to "tailor" a remedy for retroactivity, including the "remedy" of selective prospectivity; and 2) a federal rule of retroactivity can be trumped by provisions of a state constitution. Both of these assumptions run afoul of the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution.

1. The Supremacy Clause prohibits states from ignoring, weakening, or annulling this Court's constitutional mandates.

In 1988, *Bendix* held that Ohio's tolling statute impermissibly burdened interstate commerce, contrary to the Commerce Clause of the United States Constitution. That decision became the "law of the land" as provided in Art. VI, Cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The justices of Ohio's Supreme Court were duty bound to enforce this Court's decision in *Bendix*, notwithstanding any contrary provision in Ohio's Constitution.

The Supremacy Clause must be given the full force of its import; it cannot be interpreted in a narrow or begrudging fashion. As early as 1819, this Court recognized that the clause encompassed three corollaries within its broad scope:

> 1. That a power to create implies a power to preserve.
>
> 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.
>
> 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme.

M'Culloch v. State of Maryland, 17 U.S. 316, 426, 4 Wheat. 316, 4 L.Ed. 579 (1819).

Applying the Supremacy Clause and its corollaries, this Court has consistently reversed state attempts to evade or ignore controlling federal precedent, including attempts to invoke contrary state constitutional provisions, assert factual distinctions, or claim compelling state interests.

Thus, this Court held in *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), that when a state's interpretation of its constitution conflicts with this Court's interpretation of the U.S. Constitution, the latter interpretation prevails. *Reynolds* held that the Alabama Supreme Court's interpretation of its constitutional provisions

on apportionment could not be used to avoid U.S. Supreme Court interpretations of the Equal Protection Clause. Rather, such contrary constructions created "an unavoidable conflict between the Federal and State Constitution" and "the Supremacy Clause of course controls." 377 U.S. at 584.

This Court held that the Supremacy Clause controls state attempts to distinguish U.S. Supreme Court decisions in *Henry v. City of Rock Hill*, 376 U.S. 776, 84 S.Ct. 1042, 12 L.ED.2d 79 (1964). *Henry* was the second appeal to this Court of a conviction based on a state statute that punished unpopular speech. This Court had reversed and remanded once for further consideration in light of *Edwards v. South Carolina*, 372 U.S. 329, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) ("*Edwards*"). Upon remand, the South Carolina Supreme Court sought to distinguish *Edwards* and "intimated that the rule of *Edwards* was designed to guide us in determining our review of state action." *Id.* at 777. Reversing again, this Court noted that *Edwards* could not be relegated to an advisory role: "*Edwards* states a rule based upon the Constitution of the United States which, under the Supremacy Clause, is binding upon state courts ...." *Id.* Because the conviction at issue conflicted with *Edwards*, the South Carolina Supreme Court was duty bound to vacate the conviction.

Even compelling state interests must yield to this Court's interpretations of the U.S. Constitution. In *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), this Court refused to allow Arkansas' state legislature to "suspend" desegregation ordered under

Brown v. Bd. of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), after receiving threats of mob violence. As this Court held:

> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislators of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery . . . ." *United States v. Peters*, 5 Cranch 115, 136.
>
> . . .
>
> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.

358 U.S. at 18-19.

In *Bendix*, this Court declared Ohio's tolling statute to be an impermissible burden on interstate commerce conducted by out-of-state corporations. Ohio's judicial officers have sworn to enforce that decision as the law of the land and cease all efforts to enforce the invalid statute. Although it is true that Ohio's Supreme Court is responsible for enforcing the protections accorded by Ohio's constitution, that enforcement must be consistent with federal constitutional requirements. Applying an unconstitutional tolling statute to "save" time-barred claims is an unlawful means of enforcing the Ohio Constitution.

2. This Court's decision to apply a new rule retroactively is within the scope of the Supremacy Clause.

The Ohio Supreme Court first sought to justify its holding on the grounds that retroactivity is a "rule of decision" rather than a substantive holding within the Supremacy Clause. This semantic distinction is flawed both theoretically and as applied to this case.

Harper explicitly held that doctrines of retroactivity fall within the Supremacy Clause's mandate:

> The Supremacy Clause . . . does not allow federal retroactivity doctrines to be supplanted by the invocation of a contrary approach to retroactivity under state law.

Harper, 113 S.Ct. at 2519. A power to create a rule of law implies the power to preserve that rule of law. *M'Culloch v. State of Maryland, supra*, 17 U.S. at 426. To preserve a rule of law, a court must have the power to determine its application by state and federal courts.

The fallacy of the Ohio Supreme Court's attempt to create a distinction between a supreme "law" and a subservient "rule of decision" becomes even more apparent as applied in this case. This Court would not only have to overrule *Beam* and *Harper* to affirm the decision below, but the Supremacy Clause itself. In *Beam*, this Court held that *Georgia's* Supreme Court must retroactively apply a decision of this Court that had struck down a similar *Hawaii* statute. In *Harper*, this Court held that *Virginia's* Supreme Court must apply this Court's decision striking down a similar *Michigan* statute. Here, the *Ohio* Supreme Court has

refused to enforce this Court's decision striking down an *Ohio* statute, based on an allegedly contrary provision in Ohio's Constitution. It has thereby given new life to the very statute this Court found to be an impermissible burden on interstate commerce. Under these circumstances, the Supremacy Clause mandates a reversal of the repugnant state decision.

3. The Supremacy Clause proscribes state-created "remedies" that evade this Court's interpretations of the U.S. Constitution.

The Ohio Supreme Court next relies on references to "remedy" in *Beam* and *Harper* to support its decision. "Remedy" in those cases refers to *enforcement* of the Supremacy Clause, not its evasion, and cannot support the decision below.

Beam and *Harper* involve the unlawful exaction of a tax by a state. Two federal constitutional issues arise in such cases: 1) does the tax itself violate the commerce clause or some other federal constitutional provision? and 2) if so, does the state provide the taxpayer an adequate pre-deprivation or post-deprivation hearing to comport with the due process requirements of the Fourteenth Amendment? The second "remedy" issue comes into play only after it has been settled that the rule of law will apply to the parties before the Court. *Beam*, 501 U.S. at 539. *See, e.g., Hagge v. Iowa Dept. of Revenue & Finance*, 504 N.W.2d 448 (Iowa 1993), applying this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), retroactively to strike down a state tax statute and separately analyzing the adequacy of the "remedy" available to plaintiffs under state refund laws.

Here, there is no constitutional "remedy" issue to be decided after, and apart from, retroactivity. No state entity has deprived Respondent of monies or other property without a hearing or other due process. Rather, a private plaintiff's expectations of a potential judgment have simply been disappointed as the result of the "crucible of litigation." *Rivers v. Roadway Express, supra*, 114 S.Ct. at 1519.

Even in cases where remedy is at issue—such as *Beam* and *Harper*—the remedy may not annul the retroactive application of the new rule. In both *Beam* and *Harper*, the remedy to be tailored by the state courts was one which would implement this Court's decision that the tax was unconstitutional. The Ohio Supreme Court has offered no authority or rationale for its conclusion that it can impose a "remedy" which *annuls* this Court's decision that Ohio's tolling statute is unconstitutional. *Compare Hyde*, Pet. App. at A16 (J. Wright, dissenting) ("[O]ur state constitution cannot be used to accomplish what the Commerce Clause forbids").

IV. CONCLUSION

The Ohio Supreme Court has, in effect, declared Ohio's constitutional "open courts" provision to be superior to the Commerce Clause of the United States Constitution. Thus, Ohio's Supreme Court has held—notwithstanding this Court's explicit 1988 decision that the state's "tolling" statute is unconstitutional—that Ohio courts may continue to enforce the impermissible statute.

Ohio justices are sworn to uphold the United States Constitution. They cannot pick and choose which portions of this Court's decisions will apply in Ohio, and to which parties. Here, the Ohio Supreme Court has not only refused to apply a constitutional ruling issued by this Court, but it has refused to apply the ruling that struck down the very statute the Ohio court seeks to enforce.

Pursuant to the Supremacy Clause of the United States Constitution, this Court should reverse and enter judgment in favor of Petitioner.

Respectfully submitted,

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October 31, 1994

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Warren & Young
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134 West 46th Street
Ashtabula, Ohio 44004

David J. Eardley, Esq.
114 East Park Street
Chardon, Ohio 44024

Re: No. 94-3; Reynoldsville Casket Co., et al., Petitioners v. Carol L. Hyde, Respondent

Gentlemen:

This will confirm my telephone conversations with both of you seeking consent for the Dalkon Shield Claimants Trust Fund -- which was granted leave to appear as amicus on the petition -- to appear as amicus in the merits proceeding. As you know, United States Supreme Court rules require consent be separately granted to the merits proceeding, and that said consent be in writing. It is my understanding that Petitioners consent; Respondent does not.

In order to comply with U.S. Supreme Court rules, I would request Mr. Riedel to briefly confirm in writing his consent. Unless I hear from Mr. Eardley to the contrary within the next two weeks, I will prepare another motion for leave to appear, based on his refusal to consent.

If you have any questions, please do not hesitate to call.

Yours truly,

Irene C. Keyse-Walker

IKW:lme:6395

A1
Exhibit "A"

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E. Terry Warren
William E. Riedel
Carl F. Muller
Stuart W. Cordell
James D. Masur II
J. Adam Zangerle

Theodore E. Warren (1897-1969)
M. H. Young (1910-1971)

November 2, 1994

Irene Keyse-Walker
ARTER & HADDEN
1100 Huntington Building
Cleveland, OH 44115-1475

Re: Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent
United States Supreme Court Case No. 94-3

Dear Ms. Keyse-Walker:

This will confirm Reynoldsville Casket Co., Petitioner, hereby consents to the Dalkon Shield Trust's appearance as amicus curiae in the captioned case.

Very truly yours,

William E. Riedel

WER:djk

B1
Exhibit "B"

Exhibit "C"

[CRF-1]

ANNEX 4
PLAN EXHIBIT C

DALKON SHIELD TRUST
CLAIMS RESOLUTION FACILITY

A. Purpose

The purpose of the facility is to provide all persons full payment of valid claims at the earliest possible time consistent with the efficient design and implementation of the claims resolution facility. This purpose is to be achieved by (1) providing an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs, (2) providing claimants with an attractive alternative to trial by jury where settlement is not achieved, (3) providing fair and equitable compensation based upon historic values, updated by current developments, to persons injured by the Dalkon Shield, and (4) providing no compensation to persons not injured by the Dalkon Shield. The Trustees shall, as soon as practicable, design and implement a facility for the resolution of Dalkon Shield Claims. The facility is to be designed and operated in accordance with the guidelines set forth below.

B. Initial Mailing, Forms, Notice, Option Election

Following the Consummation Date, the Trust shall as promptly as possible mail to each claimant a packet containing instructions, a "short form" request for payment, a detailed claims settlement information form, a future claim deferral form and such other materials as the Trustees deem

appropriate. The instructions and forms shall be in accordance with the provisions set forth below. Where the claimant resides in a country where English is not the native or an official language, the materials in the packet shall be to the extent practicable in the native language of the claimant's country. In accordance with the terms of the Confirmation Order, any claimant who fails to return the appropriate form within twelve months from the date of mailing shall have his or her claim disallowed, unless the claimant is able to demonstrate to the satisfaction of the Trustees that the failure should be excused. The Trust shall send to each claimant who has not responded within ten months a notice that his or her claim will be disallowed if a response is not made within the allotted time.

Claimants shall be given the opportunity to elect any one of three ways for proceeding under the Claims Resolution Facility. The claimant shall make her or his election by completing and sending to the Trust the appropriate form of Claimant Affidavit, described below.

C. Option 1 of Claims Process: Short Form/Instant Offer

The Trustees shall develop a "short form" claim procedure and forms permitting claimants who elect to do so to receive payments upon a minimal showing of Dalkon Shield use and injury. The procedure is intended to (1) permit electing claimants to receive a prompt payment and (2) permit the Trust to process small claims without substantial transaction costs. The Trustees shall, thus, set for each of the various categories of claimants (*e.g.*, Dalkon Shield users, non-

users—husbands, non-users—injured child) a payment which is sufficiently large to attract claimants with *de minimis* claims, but not so large as to exceed the cost of processing the claims through options 2 or 3.

If this option is selected, the Trust waives all defenses to the claim, other than challenges based on duplication of the claim, previous payments, previous disallowance by the Court, or late filing.

The claimant elects this option by executing the appropriate Claimant Affidavit, in which (s)he attests (a) if she is claiming as a user of the Dalkon Shield, that she used a Dalkon Shield and was injured or believes she may have been injured as a result of such use, or (b) if the Claimant is not claiming as a user of the Dalkon Shield, that such claimant was injured or believes (s)he may have been injured by the use of a Dalkon Shield by another. The Trustees may, in considering any request for payment under this option, give consideration to any additional information previously submitted by the Claimant to the Court or the Trust. In cases where, on the face of the Claimant Affidavit or as [CRF-2] between the Claimant Affidavit and the additional information submitted by the claimant to the Court or the Trust, there is conflicting evidence as to Dalkon Shield use or injury, the Trustees may make such additional inquiries as they deem appropriate and may, in their discretion, offer a lesser amount or no amount.

D. Option 2 of Claims Process: Claim Form/Tailored Offer

The Trustees shall develop a "second option" claim procedure and forms permitting claimants, who elect to do so, to receive a specified payment in accordance with a schedule. The schedule shall include

specified settlement amounts for each of the injuries on Exhibit A hereto. In addition, the Trustees may prepare a schedule that varies the award for the same injuries according to the type and volume of the documentation the claimant submits. Whether or not to accept the schedule payments shall be at the sole option of the claimant. In establishing a schedule of payments, the Trustees may take into account the waiver of defenses and the waiver of detailed fact discovery by the Trust, as described below.

If this option is selected and its requirements met, the Trust waives all defenses to the claim other than challenges based upon the claim duplicating other claims by the same claimant, previous payment, late filing, previous disallowance of the claim by the Court or invalidity of information submitted to support the claim. Under this second option, unlike the first, the claimant shall be required to attest to the specific injury or injuries for which (s)he is claiming, and to answer, under oath, additional relevant questions relating to Dalkon Shield use and injury. In addition, the claimant shall be required to submit in support of the Claimant Affidavit electing this option (A) either (1) medical records ("Medical Records") showing Dalkon Shield use or (2) an affidavit of a physician or health care provider that (s)he inserted, removed, or visualized an IUD in the user and that the IUD was more likely than not a Dalkon Shield ("Medical Evidence"), and (B) Medical Records to substantiate that the claimant actually sustained the scheduled injury for which the claim is made and such other evidence as the Trustees may deem appropriate.

If Option 2 is selected, the claimant may not proceed to Option 3 unless and until she has been denied compensation under Option 2. A claimant

electing this option shall be paid the amount listed on the schedule for the most serious injury category in which the injury claimed by the claimant falls.

E. Option 3 of Claims Process: Complete Form/Early Evaluation/Offer/Arbitration/Trial

1. *Complete Form.* The Trustees shall develop a "third option" claim procedure and forms for a claimant who does not liquidate her or his claim under Option 1 or Option 2. Under this option, the claimant shall submit (1) a completed claimant information form, (2) all Medical Records of any injuries and damages alleged to have resulted from use of the Dalkon Shield by the claimant, and (3) Medical Records or Medical Evidence regarding use of a Dalkon Shield by the claimant or an affidavit of the claimant stating that she used the Dalkon Shield and explaining the basis of this knowledge.

2. *Early Evaluation.* The claim will be evaluated (i) by developing a profile of the claim based upon criteria relevant to case value, including, without limitation, information as to the nature of the injury or damages claimed, whether the claimant is a wearer of a Dalkon Shield or is making a claim based upon another person's use of a Dalkon Shield, information contained in the claimant's claim file or the claim file of a related claim, and any defenses available to the Trust at this step; (ii) by comparing the profile to corresponding profiles based upon historical data; and (iii) by establishing an amount, if any, at which the comparison of the claimant's profile with historical profiles suggests that the claim should be allowed, taking into account the quantum and quality of the evidence supporting the claim, absence of in-depth

scrutiny or discovery, the waiver by the Trust of defenses based upon the statute of limitations not evident from the face of the documents supplied or the face of the information form, lack of necessity of presentation of other evidence necessary under Option 3, other particularities that distinguish the pending claims from ones previously resolved, and any other factors the Trustees deem relevant.

3. *Early Evaluation Offer.* As soon as practicable after the claimant's delivery to the Trust of a completed information form and all necessary documentation, the Trust shall mail to the claimant a statement of the amount, if any, which the Trust offers to pay in satisfaction of the claim and a brief [CRF-3] report setting forth the reasons therefor. The claimant shall be obligated to respond in writing, within time limits to be established by the Trust, to the statement and report. The claimant shall indicate whether the offer is accepted or rejected. If the claimant rejects the offer, she may make a counteroffer, and the parties may resolve the matter at that or some other amount. If the matter is not resolved, the claim shall proceed to the next level.

4. *In-Depth Evaluation Offer/Voluntary Settlement Conference or Alternative Dispute Resolution.*

If the claim proceeds to the next level, the Trust shall undertake an in-depth review of the claim and invite the claimant to a voluntary settlement conference or any other voluntary alternative dispute resolution process as appropriate. The conference shall, to the extent practicable, be held at a location reasonably convenient to the claimant. The conference shall be attended by the claimant and a representative

of the Trust responsible for the evaluation of the claim. Either party may also be accompanied by legal counsel or other representative, provided that reasonable notice is given to the other party of attendance by such representatives. At the claimant's option, the claimant's representative may attend by himself or herself.

If a settlement is not sooner reached, not later than 60 days after the conference, both parties must submit to the other a written settlement proposal which shall remain in effect until 90 days after the conference. If neither party accepts the other's offer during this period, the claimant may proceed to arbitration or trial.

The Trust may request the claimant to provide additional information about the claim at any time during the evaluation process. Any such request shall be made in writing by the Trust, and responded to in writing by the claimant, in a manner which verifies the accuracy of the information furnished, the unavailability of any of the requested information not furnished, and, if applicable, the claimant's unwillingness to furnish any of the information requested and the reasons therefor.

5. *Voluntary Binding Arbitration or Trial.* If a settlement is not reached at the settlement conference level and the claimant has completed the preceding procedures under Option 3, the claimant shall elect either Binding Arbitration or a trial. A claimant may elect to go to binding arbitration or trial only after having applied for and received a response from the Trust at the preceding level of this Option 3.

(a) *Binding Arbitration.* The arbitrator shall be chosen from a panel of arbitrators that is selected by a neutral third party and maintained by the Trust. Arbitrators may serve for a maximum of 2 years. The hearing shall be in a location which minimizes, to the greatest extent practicable, the travel burden on the claimant. The issue to be arbitrated is the amount, if any, at which the claim should be allowed. In Binding Arbitration, the arbitrator will consider the record available in the in-depth review; the decision and offer of the Trust and the claimant; any evidence offered, including expert testimony concerning causation; evidence offered by either party as a result of medical examinations, tests or other procedures requested by the Trust; and arguments of the claimant and the Trust. Both the claimant and the Trust will have the right to be represented in Binding Arbitration by advocates, who need not (but may) be lawyers.

The arbitrator may obtain a report from an independent medical doctor or independent epidemiologist or other expert from a list of such consultants selected by a neutral third party and maintained by the Trust for independent advice on disputed medical and causation issues raised by the parties. If such a report is obtained, it shall be made available to the parties with sufficient time for them to make a response. In Binding Arbitration, all available defenses may be asserted by the Trust, other than absence of product defect. Upon completion of Binding Arbitration, the arbitrator shall issue a written award, if any, or the denial of the claim. Awards shall be for compensatory damages only.

In the event that both the Trust and the claimant agree, the arbitrator, instead of independently determining the amount of the award, shall select

either the amount demanded by the claimant in the final Option 3 proposal or the amount offered by the Trust in the final Option 3 proposal, and no other amount shall be selected. The arbitrator's award shall be binding on the claimant and the Trust.

All Arbitration Awards shall be enforceable under the Federal Arbitration Act. The Trustees shall develop such further rules concerning arbitration as they may deem appropriate.

[CRF-4] (b) *Trial.* The right to a jury trial shall be preserved, but the defendant in all trials (including jury trials) shall be the Trust and not the Debtor or Successor Corporation. The Court shall have the power to stay the commencement of any trial upon a showing by the Trust of undue prejudice due to the multiplicity of ongoing trials. Where a complaint was pending on August 21, 1985, the action shall resume, upon the claimant's completion of the Claims Resolution Process, from the point at which it was frozen, except that the Trust shall be substituted as a party defendant in place of the Debtor. Where no complaint had been filed as of August 21, 1985 the claimant, upon completion of the Claims Resolution Process, shall file a complaint naming the Trust as defendant (not the Debtor or any Successor Corporation). Venue shall be unchanged by the chapter 11 case. All claims and defenses shall be available to both sides in a trial.

For the purpose of minimizing defense costs, the Trustees should give due consideration to, and, as may be appropriate, seek a pretrial order incorporating, the following:

(1) The Trust shall have available to it all defenses, except any defense that would purport to establish that the Debtor was not liable for injuries caused by the Dalkon Shield.

(2) The Trust shall be deemed to have conceded product defect and that the product defect caused the Dalkon Shield injury, and the claimant shall be precluded from introducing any evidence on the product defect issue.

(3) The last offer of settlement made by the Facility to the claimant, if any, shall be deemed to be an offer of judgment unde Rule 68 of the Federal Rules of Civil Procedure.

(c) *Discovery.* For the purpose of minimizing defense costs, the Trustees shall also give due consideration to the coordination of discovery (1) through a multi-district litigation panel under 28 U.S.C. § 1407 and/or (2) through the Court. Upon application to the Court by the Trustees, the Court may, for good cause, exercise its power, including its power under 28 U.S.C. §§ 157 and 1334, to limit, control, coordinate or consolidate discovery undertaken or requested in connection with any trial or arbitration proceeding.

F. Option 4 of Claims Process: Deferral

A claimant may elect to defer consideration of his or her claim without waiving any rights of that claim. Such claimant shall fill out the Claimant Information Form, to the extent applicable, and provide Medical Records or Medical Evidence of Dalkon Shield use to the extent available, and, if applicable, removal. Thereafter, the Trust shall periodically send each deferred claimant a notice reminding the claimant of

the procedures for activating a claim and requesting notification of any change in address. In the first month of the third year following the Consummation Date, the Trust shall send all remaining deferred claimants notice that any claim based upon an already manifest injury not activated in 90 days will be disallowed. A deferred claim shall be activated when the claimant sends the Trust a letter indicating that she or he desires to activate the claim. The Trust shall then send the claimant a new Claimant Information Form for completion and the determination of the claim shall proceed as provided for herein. A claimant who elects to defer consideration shall not file or pursue any legal action with respect to the claim during the period of deferral, and when such a claimant requests a claim be moved to active consideration, the request must be in the form of a choice of one of the three options referred to above.

G. Guidelines

The following guidelines shall govern the Claims Resolution Facility and Claims Resolution Process:

1. *Order of Consideration of Claims.* Claimants who elect either Option 1 or Option 2 of the Claims Resolution Process shall have their claims processed by the Trust in chronological order of receipt, based upon the date on which the Trust has received all documentation necessary to process the claim. Claimants who elect Option 3 shall have their claims processed in chronological order based upon the date on which the Trust has received all documentation necessary to process the claim at that step; provided, however, that Option 3 claims which are either lawsuits that were pending on August [CRF-5] 21, 1985, or are asserted by claimants who were included

in the samples requested to complete a questionnaire during the Court's claims analysis process and who returned a completed questionnaire shall be given priority in processing over all other Option 3 claims by being placed on a priority processing list in the order of the date on which the Trust has received all documentation necessary to process the claim at Option 3. The Court shall provide the Trust a list of the sampled claimants who returned a questionnaire.

Notwithstanding the foregoing provisions, the Trustees may consider and pay claims in any order for reasons of hardship or necessity or major efficiencies in claim handling.

2. *Scheduled Compensable Claims.* In determining whether an injury could have been caused by the Dalkon Shield and, therefore, could be eligible for compensation, the Trust shall presume that the injuries listed in Exhibit A are eligible for compensation. The Trust shall consider on a case by case basis whether any injury not in Exhibit A is eligible for compensation.

3. *Payments.* The Trustees shall pay claims in a manner designed to ensure that all claims are paid in the same proportions. While it is intended that each claimant receive a substantial portion of his or her award immediately upon the determination of her or his claim, the Trustees may withhold some portion of the amounts awarded under Option 3 for claims and pay the balance withheld at such times and in such amounts as necessary to ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims. The Trustees may also determine that

compensatory damages awarded under Option 1 or Option 2 shall be paid in full immediately upon liquidation.

4. *Confidentiality.* Claim files and all communications between the Trust and a claimant or between the trust and any other person about any claimant are in the nature of settlement discussions and shall be strictly confidential.

5. *Claims Assistance by Trust Contacts.* The Trust shall endeavor to assist every claimant in the processing of her or his claim to the extent reasonable and practicable. At the time the Trust mails to the claimants the forms of Claimant Affidavits, described below, it shall also send each claimant to whom the Affidavits are sent the name, mailing address and telephone number of a representative of the Trust who has been assigned to assist the claimant in submitting her or his claim and to assist the Trust in processing the claim (the "Trust Contact"). To the extent practicable, the Trust Contact assigned to a claimant initially shall remain the Trust Contact for that claim until it is finally processed. Upon request by the claimant, the Trust Contact shall assist the claimant by answering questions about such matters as procedures, requirements, the status of the claim, and its priority for processing.

6. *Foreign Claims.* In evaluating and paying the claims of claimants residing in foreign countries, the Trustees shall take into consideration, but not be bound by, the laws as well as the treatment of claims in that country of claims such as that made by the claimant. The Facility shall not be required to hold voluntary settlement conferences outside the United

States; provided, however, that the Facility is not prohibited from holding voluntary settlement conferences outside the United States.

7. *Random Audits.* The Trust may conduct random audits to verify Medical Records and Medical Evidence submitted in connection with any other step in the Claims Resolution Process and may audit individual claims as appropriate.

8. *Costs.* The Trust and claimants shall each bear their own costs, expenses, and attorneys' fees in connection with the Claims Resolution Process, except as provided otherwise by law.

9. *Reference Materials.* In processing and valuing claims and in preparing forms and materials for those purposes, the Trustees may review and, to the extent they deem appropriate, consider the valuation factors and the procedure developed in connection with the Court's claims analysis process, including, but not limited to, the documentation on file with the Court.

10. *General Release.* As a condition to making any payment to a claimant, the Trust shall obtain a general release of all Persons except Aetna and the Trust; provided, however, that such general release shall not release claims which are based exclusively on medical malpractice and which cannot be asserted or brought over either in whole or in part, against the Trust, the Other Claimants Trust, Robins, the Successor Corporation, any Affiliates thereof, or any other Person intended to be pro-[CRF-6]tected either by the release described in Section 8.03 of the Plan or the injunction described in Section 8.04 of the Plan. Notwithstanding the foregoing, Aetna shall be

included in the general release if and when Aetna shall have performed its obligations under a Qualified Breland Settlement, except that if a claimant validly exercised the right, if any, to opt out from the *Breland* class, the general release shall be obtained upon the tender of final payment of the full amount awarded under this claims resolution facility. The Trust shall be released at the time it satisfies the award of compensatory damages given a Personal Injury Claimant by way of settlement or judgment. If allowed by state law, the endorsing of a check or draft by or on behalf of the claimant shall be additional evidence of such a release.

11. *Applicable Law.* The law to be applied to the settlement or trial of claims shall be the law that is or would have been applicable notwithstanding the pendency of the chapter 11 case; provided, however, that the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code. Pursuant to this provision, claimants who would have been or are entitled to file suit in Maryland may avail themselves of the Maryland law concerning the accrual and limitation of actions. Notwithstanding anything in this paragraph, punitive damages shall not be paid, except as provided in section 14 below. In order to reduce costs, the Trustees may waive the statute of limitations defense for purposes of settlement and take into account normal deductions for the statute of limitations defense.

12. *Product Defect.* In Options 1 and 2 of the Claims Resolution Process and Option 3, except for trial, product defect, including but not limited to design and warning defect, is not to be contested by the Trust and shall not be the subject of proof.

13. *Causation.* Causation will be in issue except as waived by the Trust. However, the Trust shall at all times, consistent with its purposes, minimize the intrusion into such private matters as the users' frequency of sexual relations, number of sex partners, age of onset of intercourse, sexual practices, and the like.

14. *Priorities Among Claims.* Claimants who have claims for compensatory damages which are meritorious and which are not time-barred shall have first call on the funds of the Trust. To the extent funds remain after all such claims are paid in full, meritorious compensatory damage claims which are time-barred shall then be administered and paid from the funds of the Trust. To the extent funds (not including Aetna Insurance) remain after all such claims are paid in full, the remaining funds shall be paid in lieu of punitive damages to all claimants (other than holders of Dalkon Shield Liquidated Claims) who received compensatory damage awards from the Trust, on a pro rata basis consistent with such awards. The Trustees may, in their discretion, set a *de minimis* amount below which such payments need not be made.

15. *Determinations Concerning Late Claims.*

(i) For purposes of this section, "Late Claim" means Dalkon Shield Personal Injury Claims for which notices or proofs of claim were not sent or received by the deadline set in the Bar Order in the Case and which have not previously been disallowed by either the Court or the Trust; provided, however, for purposes of this section only, the general disallowance of Late Claims as set forth in Section 7.02(a)(ii) of the Plan shall not constitute a previous disallowance by the Court unless the Dalkon Shield Personal Injury Claimant was previously barred by

the Court for failure to timely file a Court questionnaire.

(ii) After the Consummation Date, the following procedures shall be used to determine whether Late Claims shall be entitled to consideration and treatment on par with timely-filed Dalkon Shield Personal Injury Claims ("Timely Claims"):

(a) Within a reasonable time after submission of a Late Claim for consideration, the Trust shall seek to determine whether excusable neglect or other valid legal cause exists for treating and considering such Late Claims as and with Timely Claims. In undertaking this determination, the Trust may consider, *inter alia*, the following factors.

(I) whether the Late Claim is based upon injuries which first became manifest after the commencement of the Case or the bar date established by the Bar Order;

[CRF-7] (II) whether the holder of the Late Claim had actual knowledge of the bar date established by the Bar Order;

(III) whether the holder of the Late Claim had actual knowledge of Dalkon Shield use prior to the bar date established by the Bar Order; and

(IV) whether the holder of the Late Claim acted diligently with respect to the Late Claim under the particular circumstances surrounding the Late Claim.

For purposes of this section, appropriate evidence of a first manifestation of injury subsequent to April 30, 1986, and either lack of actual knowledge of the bar date or lack of knowledge of Dalkon Shield use shall constitute "excusable neglect."

(b) Following its determination, the Trust shall issue a written report containing its findings and

recommendations regarding whether it believes excusable neglect or other valid legal cause exists for treating and considering such Late Claim as if it were a Timely Claim. The report shall be mailed to the holder of the Late Claim and filed with the Court. The Court shall consider the Trust's report, together with any information that the holder of the Late Claim submits, and determine whether such Late Claim is entitled to be treated and considered as if it were a Timely Claim. The holder of the Late Claim shall be entitled to a hearing upon request and reasonable notice to the Trust. The Trust's findings and recommendations shall not be binding upon the Court.

(c) The Trust shall adopt procedures to minimize the expense and burden to the Trust and the holder of the Late Claim of a late-claim determination and to ensure the authenticity and credibility of the evidence it considers. To the extent practicable, the procedures hereunder shall allow for the submission of all relevant records, affidavits and other evidence by mail; provided, however, that the holder of a Late Claim shall be entitled to appear before the Trust, with or without counsel, at a mutually convenient time and place.

(d) Any Late Claim based upon an injury which first became manifest prior to the commencement of the Case and which, following completion of this process, is not to be treated and considered as if it were a Timely Claim shall be treated and considered only in accordance with the provisions of the second sentence of section 14 hereof.

H. Further Provisions

The Trust shall use its best efforts to provide, to the fullest extent possible, previously developed discovery materials including depositions and other

documents as a means of providing any discovery ordered or permitted by any court of competent jurisdiction in a trial by jury, without calling upon the Debtor, its present or former officers, directors, employees, agents, or representatives and will attempt, through court rulings or consensual procedures, to consolidate and coordinate pre-trial discovery and/or trial proceedings. In addition, the Trust shall use its best efforts to insure that the Debtor, its present or former officers, directors, employees, agents, or representatives shall not be needed in the arbitration proceedings.

I. Time Periods

The Trustees shall be able, in their discretion, to waive or modify in particular cases any time period created herein.

J. Nonadmissibility

Neither the Claims Resolution Facility nor any of the terms or provisions thereof shall be admissible for any purpose in any judicial proceeding.

K. Emergency Fund

The Trustees shall establish a program for providing immediate payments to qualified claimants who could benefit from reconstructive surgery or in vitro fertilization. Such payments shall not exceed $15,000 for any one claimant and would be credited against the compensation subsequently awarded to the claimant pursuant to the Claims Resolution Facility. In developing this program, the Trustees should consider, but are not bound by, the emergency fund program approved by the Court on May 21, 1987.

[CRF-8] **EXHIBIT A**

User Claims

PID (Pelvic Inflammatory Disease), uncontrolled bleeding, subacute/endometritis, or subacute salpingitis, with or without any of the following sequellae and consequences of the disease:

- Permanent infertility
- Temporary infertility (impaired fertility)
- Ectopic (extrauterine, or tubal) pregnancy
- Surgery
- Hospitalization
- Loss of organs
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Economic injuries in the nature of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Perforation or embedment of the Shield resulting in surgical removal with or without any of the following consequences:

- Permanent infertility
- Temporary infertility (impaired fertility)
- Infection

- Ectopic (extrauterine, or tubal) pregnancy (where infection is established)
- Hospitalization
- Loss of organs
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Economic injuries in the form of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Pregnancy which occurred with a Shield in place and terminated in spontaneous abortion (miscarriage), septic spontaneous abortion, induced abortion, or premature delivery, and any of the following consequences:

- Permanent infertility

[CRF-9] — Surgery

- Hospitalization
- Loss of uterus
- Emotional injury
- Pain and suffering
- Complications from any of the above
- Death
- Injury to the user's child

- Economic injuries in the nature of
  - medical expenses
  - wage losses
  - adoption expenses (where infertility is established)

Pregnancy which occurred with a Shield in place and terminated in the birth of a child with a birth or congenital defect or birth injury.

Child of User Claims

A birth injury resulting from premature or otherwise abnormal birth to a child born to a mother who had a Shield in place at some time during her pregnancy with the child and who delivered the child prematurely.

A congenital or a birth defect injury in a child born to a mother who had a Shield in place at the time of conception.

Economic injury to the child resulting from either claim described immediately above, in the nature of

- medical expenses
- wage losses

Father of Child User Claims

Emotional injury resulting from an injury to the claimant's child of the types described above under Child of User Claims.

Economic injury to the claimant resulting from an injury to his child of the types described above under Child of User Claims.

Husband—Losses of consortium under applicable substantive law.

Estate Claims

Any type of claim listed above which is asserted by the estate of a deceased person as a wrongful death claim.

Representatives' Claims

Any of the above types of claims which are asserted by a person who has been appointed by the court to act in a representative capacity due to incapacity of the claimant, such as a

- personal representative
- guardian ad litem
- conservator

(10)

No. 94-3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994 TERM

Reynoldsville Casket Co., et al.,

Petitioners,

vs.

Carol Hyde,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

Brief for the State of Ohio as Amicus Curiae in Support of Respondent

---

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23 pp

QUESTION PRESENTED

Whether the Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), should be applied retroactively to bar civil cases that had already been filed and were pending at the time that decision was announced.

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INTEREST OF THE AMICUS CURIAE

The State "has a manifest interest in providing effective means of redress for its residents" against tortfeasors who cause injury to them. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). In this case, the State of Ohio advanced this manifest interest by enacting a statute tolling the limitations period in specified circumstances. *See* Ohio Rev. Code §2305.15. Although the Court subsequently held that this tolling statute imposed an unconstitutional burden on out-of-state corporations under the Commerce Clause, *see Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), many Ohio citizens had relied upon it for decades in making difficult case-by-case determinations of exactly when would be the most advantageous moment to file a particular lawsuit.

The issue in this case is whether the Court's holding in *Bendix* should be applied retroactively to bar civil cases that had been filed and remained pending at the time that decision was announced. The State of Ohio respectfully submits that such retroactive application would defeat the legitimate reliance interests of Ohio citizens who had already sought redress against tortfeasors in the Ohio state courts before this Court issued its decision in *Bendix*. The amicus curiae and its citizens thus are directly affected by the ruling in this case.

Here, Respondent was injured in an automobile accident. She brought suit in state court against Petitioner Reynoldsville Casket Company and one of its employees. The timing of her lawsuit was proper in view of the tolling statute in effect at the time; if that statute had not existed, she may well have chosen to bring her suit earlier to avoid any limitations problem. Choices such as those, about whether and when to file a particular lawsuit, are often

dependent on many distinct factors, including the nature and extent of the plaintiff's injuries, their subsequent recurrence or deterioration, investigation of the facts of the incident, ascertainment of proper defendants, identification of possible witnesses, difficulties in securing counsel, and the ability of the plaintiff to secure financial relief through other channels such as various forms of collateral benefits. The important point here is that many potential plaintiffs rely on the prevailing understanding of the legal limitations period in deciding whether and when to file suit on the basis of an allegedly tortious incident. Any counsel consulted in such circumstances would responsibly provide legal advice on the very same grounds.

The "manifest interest" of the States in protecting their citizens is clearly present in tort cases:

> "'A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.'"

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974)). The State's interest is particularly strong when the plaintiff, as in this case, is a state resident.

This case thus implicates the authority of the State of Ohio to protect the vested reliance interests of its citizens by securing the forum in which its citizens had sought redress against wrongdoing in reliance upon the laws that were in effect at the time the lawsuit was filed. Accordingly, this

case directly affects the State's authority to enforce principles of the common law that have long served to create and protect an orderly society within the State. For these reasons, it is appropriate for the amicus curiae State of Ohio to present its views about why the legitimate reliance interests of its citizens should be recognized and respected by the Court in this case.

SUMMARY OF ARGUMENT

The court below properly concluded, though for different reasons than those presented here, that this Court's decision in *Bendix* should not be applied retroactively to bar this lawsuit, which had already been filed and was pending at the time the holding in *Bendix* was announced. As an initial matter, this Court explicitly concluded that it was unable to address and resolve the retroactivity issue in *Bendix*, on the ground that the issue had not been properly raised by the parties on the record before the Court. Accordingly, the legal issue of retroactivity should not be taken as having been implicitly decided in *Bendix*, where it plainly was not resolved, but should be determined in the first instance in this case.

Under the three-pronged test for determining retroactivity laid down by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the holding in *Bendix* should not be applied retroactively to bar the lawsuit at issue in this case, which had already been filed and was pending at the time that *Bendix* was decided. First, *Bendix* laid down a new principle of law that overruled clear past precedent on which litigants such as Respondent may have relied. Second, retrospective operation of the rule announced in *Bendix* would not further the purpose of that rule in any way. Third, the retroactive application of *Bendix* to bar this lawsuit would produce substantially inequitable results.

The Court's recent decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S. Ct. 2510 (1993), did not expressly overrule the Court's earlier decision in *Chevron Oil*, which thus continues to lay down the controlling standard for determining the legal issue of retroactivity on the facts of this case. To the extent that the Court's recent decision in *Harper* may instead be construed as having overruled the *Chevron Oil* decision under all circumstances, it should be reconsidered and either modified or abandoned.

ARGUMENT

The retroactivity issue presented in this case has not been previously determined by this Court, either in *Bendix* itself or in any subsequent case. The reliance interests implicated on the facts of this case are strikingly similar to those addressed in *Chevron Oil* more than twenty years ago, and thus this case squarely raises the question whether the Court's decision in *Chevron Oil* maintains any continued vitality in light of later decisions. For all of the reasons discussed below, the amicus curiae submits that *Chevron Oil* continues to provide an appropriate rule for resolving the legitimate reliance interests involved in determining the retrospective operation of decisions governing statute-of-limitations issues. Accordingly, the Court should hold that Respondent's cause of action, which had already been filed and was pending at the time that *Bendix* was decided, should not be barred after the fact by retroactive application of *Bendix*.

I. THE COURT EXPLICITLY CONCLUDED THAT IT WAS UNABLE TO ADDRESS THE RETROACTIVITY ISSUE IN *BENDIX* BECAUSE THE ISSUE HAD NOT BEEN PROPERLY RAISED BY THE PARTIES ON THE RECORD BEFORE THE COURT, AND THEREFORE THE RETROACTIVITY ISSUE SHOULD BE DETERMINED IN THE FIRST INSTANCE IN THIS CASE.

In *Bendix* itself, the Court held that the tolling statute at issue in this case violated the Commerce Clause by imposing an impermissible burden on interstate commerce. 486 U.S. at 892-95. It then determined that it should apply that holding to the parties before the Court, and did so. *Id.* at 895. In subsequent decisions, the Court has suggested that the retroactive application of a prior decision should turn substantially, if not entirely, on whether or not the Court had applied its prior ruling to the parties before it in that particular case. *See, e.g., Harper*, 113 S. Ct. at 2517-18; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538-41 (1991) (Souter, J.) (plurality opinion).

In both *Harper* and *Beam*, however, the Court noted that the retroactivity issue would be determined differently, and presumably should be understood to have remained open, in any case where the Court indicated that it had "reserve[d] the question whether its holding should be applied to the parties before it." *See Harper*, 113 S. Ct. at 2518; *Beam*, 501 U.S. at 539. But that is exactly what the Court did in *Bendix*; it specifically held that it could not determine the retroactivity issue on the record before it because that issued

was precluded on purely procedural grounds.[1] Although the Court thus applied its holding in *Bendix* to the parties before the Court, it did so *only* because it determined that on the record of that case it was unable to consider and resolve the legal issue of retroactivity at all. Thus, the *legal issue* of whether *Bendix* should properly be applied retroactively in later cases was specifically not decided by this Court.

Where a legal question expressly is not decided by the Court because it cannot be reached on purely procedural grounds, it should not be taken as having been foreclosed when properly raised in a later case. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9-12 (1991) (quoting numerous prior opinions which concluded that where the issue of the constitutionality of punitive damages had been determined to be procedurally barred, that legal issue remained open for consideration and resolution when properly raised in a subsequent case). Therefore, the retroactive application of *Bendix* should be regarded as an open question to be determined in the first instance in this case.

[1] In *Bendix*, the Court noted that the court below had "refused to consider the [retroactivity] argument because it was raised for the first time in Bendix's reply brief. 820 F.2d at 189. As the argument was not presented to the courts below, it will not be considered here." 486 U.S. at 895. Thus, the Court expressly found itself unable to decide the legal issue on purely procedural grounds.

II. UNDER THE *CHEVRON OIL* TEST FOR RETROACTIVITY, THE COURT'S HOLDING IN *BENDIX* SHOULD NOT BE APPLIED RETROACTIVELY TO BAR RESPONDENT'S LAWSUIT, WHICH HAD ALREADY BEEN FILED AND WAS PENDING AT THE TIME THAT *BENDIX* WAS DECIDED.

As explained in the preceding section, the retroactivity issue presented in this case has not been previously determined by the Court, either in *Bendix* itself or in any subsequent case. The amicus curiae therefore submits that *Chevron Oil* continues to provide an appropriate rule for resolving the legitimate reliance interests involved in determining the retrospective application of decisions governing statute-of-limitations issues. *See, e.g., Beam*, 501 U.S. at 543 (Souter, J.) (plurality opinion) (suggesting that the *Chevron Oil* analysis still governs the legal issue of whether "retroactive application is chosen for any assertedly new rule"); *id.* at 545-46 (White, J., concurring) (same); *id.* at 550-559 (O'Connor, J., dissenting) (same); *see also Harper*, 113 S. Ct. at 2517 ("*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*").[2] Applying the *Chevron Oil* analysis on the facts of in this case, the Court should hold that Respondent's cause of action, which had already been filed and was pending at the time that *Bendix* was decided, should not be barred after the fact by retroactive application of *Bendix*.

[2] This is, indeed, the very issue that the Court framed but found itself unable to address in *Bendix*: whether the ruling that the Ohio tolling statute is unconstitutional "should be applied prospectively only." 486 U.S. at 895 (citing *Chevron Oil*).

The reliance interests involved in this case are strikingly similar to those addressed in *Chevron Oil* itself. In *Chevron Oil*, as here, the plaintiff brought suit more than two years after he was injured. The injury occurred while the plaintiff was working on an oil drilling rig. At that time, the Outer Continental Shelf Lands Act, which governed such injuries, was construed to incorporate general admiralty law, including the equitable doctrine of laches. Based on its application of that approach, the appeals court in *Chevron Oil* had determined that the plaintiff's suit had been properly instituted and directed that it should proceed to trial. *See Chevron Oil*, 404 U.S. at 98-100.

Around the same time, however, the Supreme Court issued its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which held that such suits were governed by Louisiana's one-year limitations statute for personal injury actions. There was no question that the Supreme Court's decision in *Rodrigue*, which "entirely changed the complexion of [the *Chevron Oil*] case," was rendered only after the plaintiff had brought suit in *Chevron Oil*. 404 U.S. at 99. The question before the Court, therefore, was whether the *Rodrigue* decision should be applied retroactively to bar the plaintiff's lawsuit, which had already been filed and was pending at the time that *Rodrigue* was issued.

The analysis in *Chevron Oil* and in this case thus are almost exactly the same. And under the three-pronged test for determining retroactivity laid down by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the holding in *Bendix* should not be applied retroactively to bar the lawsuit at issue in this case, which had already been filed and was pending at the time that *Bendix* was decided. The *Chevron Oil* test is as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law ... by overruling clear past precedent on which litigants may have relied .... Second, [we must] weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.... Finally, ... where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-07 (citations and internal quotes omitted).

First, *Bendix* laid down a new principle of law that overruled clear past precedent on which litigants such as Respondent may have relied. The court below described and explained this fact perhaps most authoritatively in the following passage from its decision in this case: "In not filing her complaint against [Petitioners] until 1987, Hyde relied on Ohio's tolling statute, R.C. 2305.15, and the most recent interpretation of that statute by the court of appeals in her appellate district, *May v. Leidli* (1986), 32 Ohio App.3d 36, 513 N.E.2d 1347. No court of binding precedent in Ohio had ever ruled that R.C. 2305.15(A) was unconstitutional. Nearly one year after Hyde's complaint was filed, *Bendix* was announced." Pet. A8.

Second, retrospective operation of the rule announced in *Bendix* would not further the purpose of that rule in any way. The holding in *Bendix* was that the Ohio tolling statute imposed "an unreasonable burden on [interstate] commerce," 486 U.S. at 895, which was held not to be justified by the

state interests asserted in defense of the statute, *id.* at 894-95. Considered from another vantage point, Justice Scalia characterized the Court's approach as undertaking a judicial determination of what "real-world deterrent effect on interstate transactions will be produced by the incremental cost of having to defend a delayed suit." *Id.* at 896 (Scalia, J., concurring). From either perspective, the judgment rendered by the Court in *Bendix*, pursuant to its dormant Commerce Clause jurisprudence, was whether the Ohio tolling statute would impermissibly burden interstate commerce to such an extent as to undercut "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).[3]

Once the holding in *Bendix* was announced, however, the purposes served by the Court's decision were entirely fulfilled. The offending provision was invalidated for all future situations in which commercial decisions would have to be made by out-of-state corporations considering what steps to take in the Ohio marketplace. But that ruling could not and did not affect any business decisions made by such corporations prior to the date of the *Bendix* decision. Any supposed "deterrent effect on interstate transactions" created by the Ohio tolling statute, 486 U.S. at 896 (Scalia, J., concurring), had already been felt, and could not be affected in any way by the Court's further choice of whether to apply *Bendix* prospectively or retrospectively.

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[3] Another common aspect of the problem posed by the dormant Commerce Clause is whether the proposed measure would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," which again is to create and maintain a common market throughout the Federal union. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

Third, the retroactive application of *Bendix* to bar this lawsuit would produce substantially inequitable results. As in *Chevron Oil* itself, "to hold that the respondent 'slept on [her] rights' at a time when [s]he could not have known the time limitation that the law imposed upon [her]" would work grave injustice in this case. 404 U.S. at 108. "Certainly, the respondent's potential redress for [her] allegedly serious injury" is "entitled to similar protection," especially where, as in this case, "nonretroactive application here simply preserves [her] right to a day in court." *Id.*

For these reasons, therefore, the retroactivity analysis laid down in *Chevron Oil* leads to the conclusion that the *Bendix* holding should not be applied retroactively on the facts of this case.

III. THE COURT'S RECENT DECISION IN *HARPER* DID NOT EXPRESSLY OVERRULE THE COURT'S EARLIER DECISION IN *CHEVRON OIL*, WHICH THUS CONTINUES TO LAY DOWN THE CONTROLLING STANDARD FOR DETERMINING THE LEGAL ISSUE OF RETROACTIVITY ON THE FACTS OF THIS CASE.

The retroactivity analysis laid down in *Chevron Oil* has received further scrutiny in several recent decisions. None of those subsequent cases, however, purports to overrule *Chevron Oil* as a general matter, and certainly no such extraordinary ruling is apparent from the explicit discussion contained in those cases. Therefore, *Chevron Oil* is properly understood as continuing to set out the retroactivity analysis that governs in those civil cases where the issue is properly before the Court for determination. And if instead the Court determines that *Chevron Oil* does not govern the retroactivity issue as a general matter in all

civil cases, then at least *Chevron Oil* should continue to apply in cases -- like this one -- which concern the potential retrospective operation of a decision that would shorten the limitations period so as to bar suits that had already been filed and were pending at the time that decision was rendered.

The legal issue of retroactive application has been considered by the Court in three recent cases, all quite distinct from *Chevron Oil* itself, which concerned state taxing schemes that were judged to violate the Commerce Clause. In *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990), four members of the Court applied the three-part *Chevron Oil* test to determine whether the recent decision in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), which invalidated state highway use equalization taxes, should be applied retroactively. *See Smith*, 496 U.S. at 178-86 (O'Connor, J.) (plurality opinion). These Justices expressly declined what they described as "a proposal that we *sub silentio* overrule *Chevron Oil*." *Id.* at 190.

Four dissenting Justices in *Smith*, by contrast, described *Chevron Oil* as a decision that did not lay down general principles of retroactivity that apply to all civil cases. Instead, these Justices understood *Chevron Oil* as establishing principles that apply only in cases where the federal courts properly exercise "equitable discretion." *Smith*, 496 U.S. at 220-222 (Stevens, J., dissenting). One such area involves "the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver." *Id.* at 221. The dissenting Justices cited two further decisions that they described as having characterized the reach of *Chevron Oil* in the same fashion, *viz.*, as applying most directly in cases that raise limitations issues. *See id.* at 222-223; *see also Saint Francis College v. Al-Khazraji*, 481 U.S.

604, 608 (1987) (*Chevron Oil* "counsels against retroactive application of statute of limitations decisions in certain circumstances"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-663 (1987) (same). All of these Justices thus concluded that *Chevron Oil* does and should continue to have vitality at least in this specified sphere.

In *Beam*, the Court fragmented on the issue of whether its ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which struck down state laws imposing discriminatory excise taxes on imported alcoholic beverages, should apply retroactively. Justice Souter, speaking for two members of the Court, concluded that the principle of selective prospectivity should not be employed in the Court's decisions. Therefore, because the Court in *Bacchus* had applied its ruling to the parties before it without giving any indication that the legal issue of retroactivity had been reserved or otherwise could not be decided, it should be given retrospective operation in all other cases. 501 U.S. at 539 (Souter, J.) (plurality opinion). Yet Justice Souter clearly did not intend to overrule *Chevron Oil*, and indeed described the effect of his approach much more modestly, saying only that to a limited extent, "our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case." *Id.* at 543; *see also id.* at 545-46 (White, J., concurring) (declaring that the *Beam* decision did not sound a retreat from *Chevron Oil* in cases where it properly applies and noting that *Chevron Oil* had not been overruled). The three dissenting Justices, more broadly, expressed fidelity to the *Chevron Oil* retroactivity analysis in all civil cases, which they viewed as grounded in "well-settled precedent." *Id.* at 550 (O'Connor, J., dissenting).

In *Harper*, finally, the Court considered whether its decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S.

803 (1989), which held that discriminatory state taxes on Federal retirement benefits are unconstitutional, should be given retrospective application. A majority of the Court held that in any case where the legal issue of retroactivity is decided and not reserved, the holding of that case should be applied in like manner to all other parties who come before the courts. *See* 113 S. Ct. at 2518. The Court thus stated that it was adopting and endorsing the approach that had been articulated by Justice Souter in *Beam*. *Harper*, 113 S. Ct. at 2517-18. Nowhere in the Court's opinion did it purport to overrule *Chevron Oil* as a general matter.[4]

Justice Kennedy, in a concurrence that was joined by Justice White, stated his view that "retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil*," and distanced himself from any "broad dicta" to the contrary in the Court's opinion. *Harper*, 113 S. Ct. at 2525 (Kennedy, J., concurring). And Justice O'Connor, in a dissent joined by the Chief Justice, stated her continuing adherence to "our traditional retroactivity analysis as articulated in *Chevron Oil*," *id.* at 2526 (O'Connor, J., dissenting), and undertook such an analysis in that case, *id.* at 2631-36.

It thus appears that the Court has never overruled *Chevron Oil*, and that its three-pronged inquiry continues to govern the legal issue of retroactivity in any subsequent case where the issue has been reserved or could not be resolved in the initial decision. Even more to the point, a substantial majority of Justices appears to continue to adhere to *Chevron Oil* in cases that involve "the application of a statute of

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[4] It should be noted, again, that Justice Souter in *Beam* did not purport to overrule *Chevron Oil*, but instead described it as generally "irrelevant" to the issues raised in that case. 501 U.S. at 543 (Souter, J.) (plurality opinion).

limitations, an area over which the federal courts historically have asserted equitable discretion." *Smith*, 496 U.S. at 221 (Stevens, J., dissenting). On both of these grounds, therefore, the *Chevron Oil* analysis constitutes the proper test for determining the legal issue of retroactivity on the facts of this case.

IV. TO THE EXTENT THAT THE COURT'S RECENT DECISION IN *HARPER* MAY BE CONSTRUED AS HAVING OVERRULED *CHEVRON OIL* UNDER ALL CIRCUMSTANCES, IT SHOULD BE RECONSIDERED AND EITHER MODIFIED OR ABANDONED.

As described in the preceding section, the Court has not overruled *Chevron Oil* in any of the three cases in which the Court has more recently considered its retroactivity jurisprudence. Each of those cases, moreover, presented quite distinct issues raised by the prior invalidation of state taxing schemes. By contrast, as Justice Stevens noted in *Smith*, 496 U.S. at 222-223 (Stevens, J., dissenting), the Court has applied *Chevron Oil* with approval in two recent cases that raised limitations issues, *see Saint Francis*, 481 U.S. at 608; *Goodman*, 482 U.S. at 662-663, issues that are indistinguishable from those raised in this case. In this context, at least, *Chevron Oil* continues to frame the proper analysis of the legal issue of retroactivity.

Therefore, to the extent that *Harper* might be erroneously construed as having overruled *Chevron Oil* under all circumstances, *Harper* itself should be reconsidered and either modified or abandoned. If *Harper* were to be taken as having *sub silentio* overruled *Chevron Oil* under all circumstances, then the important doctrine of *stare decisis* would have been grossly disserved. "Considerations in favor of *stare decisis* are at their acme in cases ... where reliance

interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.). That is plainly the case here, however, and it is also true of every case in which *Chevron Oil* applies to govern the retroactivity of a judicial decision shortening the limitations period upon which litigants have relied in filing suit. *See, e.g., Chevron Oil*, 404 U.S. at 108.

Moreover, nothing in *Harper* compels such a broad reading to be given to its "dicta." *See id.*, 113 S. Ct. at 2525 (Kennedy, J., concurring). If any such error were to be made in widening the scope of that decision, then the resulting extinguishment of legitimate vested reliance interests could well contravene the dictates of the Due Process Clause. *See, e.g., Reich v. Collins*, 63 U.S.L.W. 4032 (U.S. Dec. 6, 1994). And in that instance, the "freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once." *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting). Thus, the Court in this case should declare plainly that *Harper* is not to be construed as having overruled the retroactivity analysis of *Chevron Oil* under all circumstances and, in particular, that *Harper* does not do so on the facts of this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Respondent, the decision of the Supreme Court of Ohio should be affirmed and Respondent's pending cause of action should be permitted to proceed to trial in the state courts.

Respectfully submitted,

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December 13, 1994

No. 94-3

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al*
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF BROWN & SZALLER CO., L.P.A., SPANGENBERG, SHIBLEY, TRACI, LANCIONE & LIBER, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AND THE OHIO ACADEMY OF TRIAL LAWYERS IN SUPPORT OF RESPONDENT

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MOTION TO APPEAR AS *AMICI*

The law firm of Brown & Szaller Co., L.P.A., the law firm of Spangenberg, Shibley, Traci, Lancione & Liber ("Spangenberg"), the Association of Trial Lawyers of America ("ATLA") and the Ohio Academy of Trial Lawyers ("OATL") (collectively "*amici*") respectfully request leave to appear as *amici curiae* on the merits in support of the Respondent.

The law firms of Brown & Szaller and Spangenberg represent Ohio residents who allege injury from use of the A.H. Robins Company's ("Robins") Dalkon Shield intrauterine

device ("IUD"). ATLA and OATL are voluntary bar associations whose members primarily represent injured victims in personal injury actions. These attorneys, some of whom represent Ohio Dalkon Shield victims, are committed to the proposition that the right to seek legal redress in court for wrongful injury is fundamental to Americans. This right is secured in many states, including Ohio, by express provisions of the state Constitution. ATLA and OATL have participated as *amicus curiae* in this Court and in cases throughout the United States in support of injury victims whose right to seek redress may be extinguished by legislative or judicial action.

A significant portion of Ohio's Dalkon Shield victims and their attorneys relied on Ohio's tolling statute to determine *when* to file claims against Robins, the Virginia corporation that manufactured the Dalkon Shield. Robins filed for reorganization on August 21, 1985, which automatically stayed all litigation against it and prohibited the filing of any new actions. Subsequent to their filing, and during Robins' reorganization this Court determined Ohio's tolling statute violative of the Commerce Clause in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). Because the issue of the retroactivity of *Bendix* appeared ripe for the Ohio Supreme Court to determine in *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994), Brown & Szaller, Spangenberg, and OATL appeared as *amici* on Respondent's behalf in the Ohio Supreme Court. Counsel from Brown & Szaller presented oral argument. Counsel argued, on behalf of the Ohio Dalkon Shield victims, that the very recent decision in *Harper v. Virginia Department of Taxation*, 509 U.S.____, 113 S. Ct. 2510 (1993) mandated retroactively applying this Court's decision in *Bendix*, but that *Harper's* directive for the state to determine the appropriate remedy to be accorded Respondent also required the Ohio Supreme Court

to consider the inequity to the Respondent and the plight of Dalkon Shield victims who might lose their right to pursue litigation filed at a time when there was no reason to believe that the statute of limitation might have run. The Ohio Supreme Court did, but if this Court reverses *Hyde*, Dalkon Shield victims residing in Ohio may be barred from pursuing claims that were timely filed under Ohio law.

This Court has granted the Motion of the Dalkon Shield Claimants Trust ("Trust") (the liability successor to Robins for claims of those injured by the Dalkon Shield IUD) for leave to file as *amicus* in support of the Petition for Writ of Certiorari; the Trust has filed a Motion to appear as *amicus* on the merits.

Pursuant to U.S. Supreme Court Rule 37.3, the undersigned *amici* requested, in writing, permission of the parties for *amici's* participation. Petitioners refused; Respondent granted permission. (See Exhibits A, B, C and D, attached.)

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether federal law requires the dismissal of state court cases that appeared timely when filed, but proved untimely under the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988).

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I. INTEREST OF THE *AMICI*

Interests of *amici* are fully described in the Motion accompanying this Brief.

A. A.H. Robins' Dalkon Shield Litigation.

The Dalkon Shield IUD was a defective and dangerous intrauterine contraceptive device manufactured, promoted and sold by the A.H. Robins Company ("Robins") of Richmond, Virginia from January 1971 to June 1974. The Dalkon Shield

spawned thousands of lawsuits[1] against Robins for a host of injuries. To stem the continuing tide of Dalkon Shield lawsuits, Robins filed for bankruptcy protection on August 21, 1985 in the United States Bankruptcy Court, Eastern District of Virginia.

During the bankruptcy proceeding, the court set a cut-off date of April 30, 1986 for the filing of claims against Robins. By this cut-off date, 179,983 Dalkon Shield victims (over 6,000 of whom were Ohio residents and some of whom had lawsuits pending in Ohio state and federal courts against Robins when Robins filed for bankruptcy protection) filed claims. A significant portion of the Ohio residents who filed claims relied on the provisions of the tolling statute (Robins was an out-of-state corporation) when they and their attorneys determined when to file claims.

All Dalkon Shield litigation pending against Robins was stayed when Robins filed its bankruptcy petition on August 21, 1985, and the Dalkon Shield litigants then filed their personal injury claims in the bankruptcy. Other Ohio Dalkon Shield victims who had not yet pursued litigation filed timely claims in Robins' bankruptcy by April 30, 1986, and were likewise prohibited from then pursuing litigation. Only within the last year have any of the Ohio Dalkon Shield victims been released and permitted to pursue litigation in the courts.

But for the Robins bankruptcy stay commenced in 1985, the victims may well have had their claims resolved by settlement or litigation prior to the 1988 decision of this Court in

[1]The Kansas Supreme Court in *Tetuan v. Robins*, 241 Kan. 441, 783 P.2d 1210 (1987) summarized Robins' wrongful conduct and the dangers of the Dalkon Shield at 783 P.2d 1240; *see also Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984); *Knaysi v. A.H. Robins Co.*, 679 F.2d 1366 (11th Cir. 1982); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, CCH Prod. Liab. Rept. P10, 085, 38 U.C.C. Ref. (Colo. 1984); *Hilliard v. A.H. Robins Co.*, 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (1983).

Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 108 (1988) (hereinafter "*Bendix*"). Certainly they would have been resolved prior to the 1993 decision of *Harper v. Virginia Department of Taxation*, 509 U.S. ____, 113 S. Ct. 2510 (1993) (hereinafter "*Harper*"), in which case *Chevron Oil v. Huson*, 404 U.S. 97 (1971) (hereinafter "*Chevron Oil*"), would have determined the appropriate remedial relief.

B. Robins' Plan of Reorganization, and the Creation of the Dalkon Shield Claimants Trust.

Robins' Plan of Reorganization, confirmed in 1988 and consummated in 1989, provided for a $2.33 billion trust fund to compensate Dalkon Shield victims. The Dalkon Shield Claimants Trust was created to assume Robins' liability for Dalkon Shield injuries. Monies are to be used by the Trust to resolve cases by settlement and, failing that, to satisfy judgments, obtained through arbitration or litigation. The Plan further provided that

> [t]he law to be applied to the settlement or trial of claims shall be the law that is or would have been applicable notwithstanding the pendency of the Chapter 11 case; provided, however, that the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code.

Trust *Amicus* Brief , App. C9.

If an offer of settlement from the Trust is rejected, the victim must attend a "settlement conference", set at the discretion of the Trust, prior to instituting arbitration or litigation. In some senses the term "settlement conference" is a misnomer, since settlement is not discussed.[2] Therefore,

[2]See Exhibit E.

although the Trust is mantled with the responsibility to effectuate settlement over the more cost consuming methods of resolution by arbitration or litigation, in many instances settlement is not possible because of the no-negotiation policy adopted by the Trust. An offer made to a victim is truly a take it or leave it offer. And if refused, many victims feel that the rules[3] requested by the Trust and approved by the District Court regarding choice-of-law and statutes of limitation in arbitration make that forum unavailable and unattractive, leaving only litigation to protect their rights. Those same rules further prohibit Dalkon Shield victims from instituting litigation against the Dalkon Shield Claimants Trust until they are "certified" by the Trust — a process which has begun for Ohio Dalkon Shield victims only within the last year.

C. Assertion of the Statute of Limitation Defense by the Dalkon Shield Claimants Trust; Affirmance of *Hyde* Will Not Detriment the Trust at the Expense of Ohio Dalkon Shield Litigants.

When it is the defendant, the Trust asserts available limitation defenses only against arguably the most seriously injured —victims who seek more than $20,000 in damages.[4] Statutes of limitation are not considered by the Trust when making offers of settlement, and are not raised in arbitrations in which the victim seeks $20,000 or less in damages.

[3]At the request of the Trust, a July 1991 Order issued from the District Court interpreting the Plan to provide, among other things, that absent "certification" by the Trust a claimant could not proceed to litigation, and that any claimant electing arbitration rather than court adjudication would proceed under Trust drafted choice-of-law and statute of limitation provisions. The order, Administrative Order No. 1, was appealed, but as of the writing of this *Amicus* Brief no decision has forthcome. A Petition for a Writ of Mandamus to the United States Court of Appeals for the Fourth Circuit was filed in this Court in November 1994.

[4]See Exhibit F, correspondence from the Dalkon Shield Claimants Trust to a Dalkon Shield victim, dated November 29, 1994.

The Trust correctly notes that, because of the decision below, it cannot successfully raise the statute in Ohio as a defense, but fails to mention that, when the Ohio Dalkon Shield victims filed claims, they were *timely*, and *not* barred by any statute. The tolling statute they relied upon when many of them filed timely claims was not held unconstitutional in *Bendix* until *after* they filed claims.

The Trust suggests *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St. 3d 240, 626 N.E.2d 75 (1994) (hereinafter "*Hyde*") " . . . [benefits] Ohio Dalkon Shield claimants to the detriment of claimants in other states and [encourages] the depletion of Trust funds through litigation by Ohio claimants . . ." (Trust *Amicus* Brief at 1). *Amici* disagree for two reasons.

Finding inequities in the Trust's selective use of statute of limitation defenses, a number of state legislatures have passed legislation effectively negating the statute of limitation defense in litigation against Dalkon Shield victims in their states. (*See*, the statutes of New York, Kansas and California, attached hereto as Exhibits G, H. and I.) Therefore, *Hyde*, rather than being a "detriment" to claimants in other states, simply puts Ohio Dalkon Shield victims on an equal footing with them.

Second, approximately two-thirds of the corpus of the Trust remains, while the vast majority of timely claims (estimated at 90%) have been resolved. There is, therefore, no chance that the Ohio Dalkon Shield victims who claim serious injury in litigation will cause a shortfall in the approximate $1.5 billion dollars remaining in the fund.

II. SUMMARY OF ARGUMENT

The Ohio Supreme Court decision below held that a retroactive application of *Bendix* did not bar Respondent Carol Hyde's cause of action. *Bendix* deemed the Ohio tolling statute upon which she relied violative of the Commerce Clause, and *amici* agree that *Harper* mandated the retroactive application of *Bendix*.

The Court below did retroactively apply *Bendix*, but it correctly recognized that the "application" of the retroactive decision of this Court included the duty by the state to determine, consistent with due process, the appropriate remedy to be accorded the party aggrieved by the infirm statute.

A statute of limitation is not a fundamental right, the loss of which is a due process violation. Conversely, the Ohio Constitution guarantees the right of access to its courts. The Ohio Supreme Court's remedy analysis weighed the non-fundamental right of limitation of Petitioners against the vested right of access to the courts accorded Respondent by the Ohio Constitution. Under this analysis, the Court determined that the constitutional right substantially outweighed the right of bar of limitation, and refused to give Petitioners a remedy that would strip Respondent of her vested right of access to court.

In *Chevron Oil*, this Court enunciated equitable principles which are as applicable to remedy analysis as they are to choice-of-law inquiries. Utilizing those principles to determine the remedy to be accorded, the Ohio Supreme Court determined that *Bendix* overturned "clear past precedent" which was reasonably relied upon by her, and again refused to dismiss her complaint.

The remedy analysis by the Ohio Supreme Court was proper, equitable and balanced. The decision below should be affirmed.

III. ARGUMENT

A. When Retroactively Applying a Decision of this Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When it Balances a Fundamental Vested Right of Access to the Courts Against the Non-Fundamental Right of a Bar by Limitation.

1. The Ohio Supreme Court in Fact Retroactively Applied *Bendix*.

In *Harper*, the plurality decision announced by Justice Thomas made clear that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id., 113 S. Ct. at 2517.

Bendix continued the recognition enunciated in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (hereinafter "*Beam*"), that the Supremacy Clause forbids "federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Harper*, 113 S. Ct. at 2519. *Harper* put on the same plane in the civil arena the criminal retroactivity doctrine expressed in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Court below characterized its own decision as one which " . . . does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows Section 16, Article I of the Ohio

Constitution and the Commerce Clause of the federal Constitution to co-exist." *Hyde*, 626 N.E.2d at 78. The Ohio Supreme Court adhered to the retroactivity mandate of *Harper*, but the refusal to bar vested claims which had accrued prior to announcement of *Bendix* was the product of remedy analysis. The holding below was correctly characterized by *amicus* Dalkon Shield Claimants Trust:

> In the second part of [the Ohio Supreme Court's] opinion, the Ohio Supreme Court holds, in the alternative, that the retroactive application of *Bendix* does not require a dismissal of Respondent's claims.

Trust *Amicus* Brief at 7.

The holding of the Ohio Supreme Court was the result of its applied understanding of this Court's decision in *Harper*. The Court below phrased that understanding of *Harper's* dictates as follows:

> . . .[A] state, when retroactively applying a Supreme Court decision, "retains flexibility" in fashioning appropriate relief . . .(citation omitted). . . *Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion *is to be retroactively applied*.

Hyde, 626 N.E.2d at 77 (emphasis supplied).

2. Having Retroactively Applied *Bendix*, as Mandated by *Harper*, the Ohio Supreme Court Had the Responsibility of Determining a Remedy, and Consistent With Due Process to be Accorded Petitioners Balanced the Fundamental Vested Right of Access to the Courts Against the Non-Fundamental Right of a Bar by Limitation.

Once retroactivity of a federal decision is applied by the state court, the state must then determine, consistent with federal

due process, the appropriate remedy to be accorded the litigant whose rights have been violated.

> . . . The remedial inquiry is one governed by state law, at least where the case originated in state court . . . [T]he antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise.

Beam, 501 U.S. at 535.

This Court answered the antecedent question in *Bendix*, and held Ohio's tolling statute unconstitutional. Having made that decision retroactive by *Beam* and *Harper*, the remedial inquiry, "*i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one" (*Beam*, 501 U.S. at 535), is then for the state to decide consistent with federal due process.[5]

This Court recognized in *Bendix* that the Ohio statute of limitation it deemed violative of the Commerce Clause was "an integral part of the legal system and . . . relied upon to protect the liabilities of persons and corporations active in the commercial sphere", but the statute of limitation was not a "fundamental right". *Bendix*, 486 U.S. at 893, *citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). *Chase* held that the taking of the bar of a statute of limitation from a defendant by retroactive legislation is not a *per se* Fourteenth Amendment violation.

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[5] "In fact, the only federal question regarding remedies is whether the relief afforded is sufficient to comply with the requirements of due process. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31-52, 110 S.Ct. 2238, 2247-2258, 110 L.Ed.2d 17 (1990)." *Beam* at 2443 (O'Connor,J., dissenting).

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. . . . [C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.

Id., 325 U.S. at 304-05.

A statute of limitation is not a fundamental right protected by the Fourteenth Amendment, and due process is not violated when the benefits of a statute of limitation are taken from a defendant by retroactive legislation. The Ohio Supreme Court has likewise recognized that judicial retroactive taking of statute of limitation benefits by court decision (recognizing a "discovery rule" as opposed to "termination of patient relationship" for commencement of a medical malpractice cause of action) is not the taking of a "vested right".

> Although the new rule has the potential of exposing doctors (and their insurance companies) to liability for greater periods of time than did the old rule, it is a procedural change and does not entail the disruption of any contractual or vested right.

Obral v. Fairview General Hospital, 13 Ohio App. 3d 57, 59-60, 468 N.E.2d 141 (Cuy. Cty. 1983), citing *Gregory v. Flowers*, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

Conversely, the pursuit of "a cause of action existing at the time of a remedial [limitation] statute is a vested right "that cannot be taken away" under Ohio law. *Gregory v. Flowers*, 32 Ohio St. 2d 48 290 N.E.2d 181 (1972), *citing Smith v. New York Central Railroad Co.*, 120 Ohio St. 45 170 N.EE. 637 (1945). Nor can such a vested right be taken by judicial

decision. *Peerless Electric Co. v. Bowers*, 164 Ohio St. 209 129 N.E.2d 467 (1955). *In accord, State ex rel. Tavenner v. Indian Lake School District*, 62 Ohio St. 3d 88, 578 N.E.2d 464 (1955). The Ohio Constitution forbids the taking of a vested cause of action from a personal injury plaintiff because it "would totally destroy an accrued substantive right". *Adams v. Sherk*, 4 Ohio St. 3d 37, 446 N.E.2d 165 (1983).

The Court below was charged by *Beam* and *Harper* to perform a remedial analysis consistent with due process, and in so doing could consider the individual equities in the analysis. Justice Souter in *Beam* counseled, "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." *Beam*, 501 U.S. at 543.

Weighing the remedy to be accorded Petitioners, the lifting of the ban of the statute of limitation against the loss to a litigant of her Ohio Constitutionally protected vested right of access to court, the Hyde court denied Petitioners' dismissal of the cause of action brought against them by Carol Hyde. The decision was simply the result of the "consideration of individual equities", permitted by *Chevron Oil*. The Court weighed the Ohio Constitutional right of access to court against a right protected neither by Federal nor state Constitution. The Court's remedy did not provide Petitioners with a bar of limitation, but such a result was proper because relief may be "denied 'retroactive' effect" in the sense that independent principles of law [may] limit the relief that a court may provide under current law." *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 209 (1990) (Stevens, J., dissenting).

B. When Retroactively Applying a Decision of This Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When It Considers (a) Whether the Decision to be Applied Retroactively Establishes a New Principle of Law or Overturns Clear Past Precedent on Which Litigants May Have Relied, (b) Whether Denying the Rule Retroactive *Effect* Will Retard its Operation in Light of the Rule's History, Purpose and Effect and, (c) Whether the Decision Could Produce Substantial Inequitable Results if Applied Retroactively Without Benefit of Remedy.

1. The Ohio Supreme Court in *Hyde* Retroactively Applied *Bendix*, per the Mandate of *Harper* (*see* Argument (A)(1), *supra*).

2. After Retroactively Applying a Decision of this Court Which Deemed a State Tolling Statute Violative of the Commerce Clause, the State's Determination of a Remedy is Consistent With Due Process When it Weighs the Remedial Principles of *Chevron Oil*.

In *Chevron Oil*, the decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), (holding that Louisiana's one-year limitation on personal injury actions applied to actions arising on the outer continental shelf), did not require dismissal, because to do so would deprive the plaintiff of the right to proceed with litigation on the basis of unforeseeable superseding legal doctrine.

The plaintiff in *Chevron Oil* had instituted the action more than one year before *Rodrigue* had been decided. As a result of *Rodrigue*, however, the plaintiff's action was time barred more than two years before *Rodrigue* was decided. In such circumstances, this Court concluded that *Rodrigue* did not require retroactive remedies based on a consideration of the following three factors:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

Chevron Oil, 404 U.S. at 106-07.

State courts may be guided by similar equitable principles in their remedial analysis of the effect of application of a retroactive decision of this Court. "The generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated." *Beam*, 501 U.S. at 543. The equitable principles that guided this Court in *Chevron Oil* have, at times, been characterized as "remedial principle[s] for the exercise of equitable discre-

tion" (*American Trucking Assns. v. Smith*, 496 U.S. 167, 220 (1990) (hereinafter *American Trucking*) (Stevens, J., dissenting) rather than "choice-of-law principles." (*Id.*)

Thus, the principles that drove *Chevron Oil*, whether cast as choice-of-law or remedial principles, are fully applicable here, and it was appropriate for the Court below to consider them when determining the remedy to be accorded after retroactive application of *Bendix*. Rodrigue was a case of first impression, as was *Bendix*. *Rodrigue* effectively overruled a long line of decisions; so, too, *Bendix* overruled a long line of Ohio cases upholding the Ohio tolling statute. When Respondent filed her complaint, just as the injured party in *Chevron Oil*, the most she could do was "rely on the law as it then was." *Id.*, 404 U.S. at 108. The Court in *Hyde* below had the same reluctance as this Court in *Chevron Oil* to abruptly terminate a lawsuit and thereby deprive the injured party of any remedy whatsoever on the basis of "a subsequent determination . . . [she] could not have foreseen." *Hyde*, 626 N.E.2d at 78.

Use of *Chevron Oil* principles by the *Hyde* Court in its remedial analysis of the "retroactive effect" (*American Trucking* , 496 U.S. at 209, (Stevens, J., dissenting) of a retroactivity bar of limitation was especially appropriate.

> . . .*Chevron Oil* involved the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches and waiver.

Id., at 221 (Stevens, J., dissenting)

a. Bendix Overturned Past Precedent on Which Respondent Carol Hyde Reasonably Relied.[6]

The finding by the Court below that Respondent reasonably relied upon the statute and "could not have foreseen that [it] would be struck down" (*Hyde*, 626 N.E.2d at 77) is well supported. A review of the Ohio tolling statute cases demonstrate that the statute was uniformly applied to out-of-state corporations not subject to personal jurisdiction and was never held to be unconstitutional until *Bendix*.

In *Title Guaranty & Surety Co. v. McAllister Admx.*, 130 Ohio St. 537, 200 N.E. 831 (1936), the Court held that if the plaintiff could obtain service within the limitations period, a defendant corporation was not "out of the state" or "concealed" within the meaning of the tolling statute.

The holding of *Title Guaranty* was soon severely limited, then forever discarded altogether.

The Ohio Supreme Court began the limiting process by first distinguishing *Title Guaranty*. In *Commonwealth Loan Co. v. Firestine*, 148 Ohio St. 133, 73 N.E.2d 501 (1947), the court held that the tolling statute tolled the running of the statute of limitations against a person, as distinct from a corporation, absent from the state, against whom judgment might be taken pursuant to a cognovit note.

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[6]Petitioner's assertion that "in *Crespo v. Stapf*, 608 A.2d 241 (1992), the New Jersey Supreme Court decided essentially the same issue and concluded that a *Chevron Oil Company v. Huson* analysis dictated the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*" (Petitioners' Brief, at 27) is in error. The New Jersey Supreme Court did not retroactively apply *Bendix*, but instead relied heavily on the prospective application of its earlier decision in *Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. denied* 469 U.S. 1123.

Three years later, in *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950), the Court held that a person who leaves the state after the accrual of a cause of action against him tolls the running of the statute of limitations. *Couts* was quickly followed by *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950), which held that the savings statute applies to a defendant obligated under a promissory note irrespective of whether the person left the state after execution of the note or was out of the state when he executed the note. Thus, in a span of four years, the Ohio Supreme Court moved completely away from using service of process as a measurement, and began focusing exclusively on the defendant's absence from the state.

In *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953), the Ohio Supreme Court expanded the scope of the statute when it held that the word "person" in the saving statute included a corporation.

Thompson v. Horvath, 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967), held that if a *domestic* corporation (as opposed to a "person", *Id.* at 406) leaves Ohio but can still be served by substitute service, the tolling statute does not apply. And *Partis v. Miller Equipment Co.*, 439 F.2d 262 (6th Cir. 1971), followed the new Ohio Supreme Court lead of *Thompson* — short-lived as it was.

Just one month later, the Ohio Supreme Court decided *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 269 N.E.2d 121 (1971). The *Seeley* court held that application of the tolling statute is not limited to persons who were residents of the state and then left after the accrual of a cause of action, but also extended to persons who were never residents of the state. In reliance on *Couts* and *Commonwealth Loan Co.*, the *Seeley* court decided that the tolling statute applies even though service of process via the long arm statute could have been obtained at any time.

The *Seeley* court specifically rejected *Title Guaranty* and *Thompson*, and seemingly limited its application to their specific facts. The Court held that application of the tolling statute is proper so long as the defendant could not be served by personal service. Since personal service requires an in-state presence, the Court was stating clearly that if a defendant has no presence within the state of Ohio, the tolling statute tolls the statute of limitations.

In *Ohio Brass Co. v. Allied Products Corp.*, 339 F. Supp. 417 (N.D. Ohio 1972), an Ohio district court specifically held that *Seeley*, not *Partis*, governed the application of the tolling statute and that the tolling statute applies so long as the defendant is not subject to personal service.

In *Durham v. Anka Research, Ltd.*, 60 Ohio App. 2d 239, 396 N.E.2d 799 (Ham. Cty. 1978), the court of appeals held that, in reliance on *Seeley*, the tolling statute applies to an out-of-state corporation, even though it was amenable to service of process under the long arm statute. Likewise, in reliance on *Seeley* and *Ohio Brass*, the district court in *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (N.D. Ohio 1979), held that a defendant who is not amenable to personal service is out-of-state within the meaning of the tolling statute.

In 1981 a federal district court in *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981) relied upon this Court's decision in *Chase* when it held that "defendants have no fundamental right to the protection of limitations statutes." *Vostack*, 510 F.Supp. at 221. Then, applying the rational basis test, the court determined the statute did not violate due process.

Prior to the filing of Respondent's complaint against Petitioners, the "most recent interpretation of [the] statute by the Court of Appeals in her appellate district" (Hyde, 245), *May v. Leidl*, 32 Ohio App. 3d 36, 513 N.E.2d 1347 (Gea.

Cty. 1986), held that "a corporation that is neither physically present in Ohio nor has a statutory agent in Ohio does not receive the protection of the two-year limitations period for personal injury . . ." *Id.*, at 37. A federal district court the next year (1987) agreed. *Wack v. Lederle Laboratories*, 666 F. Supp. 123 (N.D. Ohio, E.D. 1987).

Prior to its August 1985 Petition in Bankruptcy, Robins unsuccessfully challenged the tolling statute in litigation involving the Dalkon Shield in Ohio. In an attempt to dismiss claims of Dalkon Shield victims who relied on its provisions, Robins argued that the statute was violative of the Commerce Clause. Chief Judge Rubin held the statute constitutional as applied to toll limitations against Robins, finding the statute neither inf irm *per se* nor under a balancing test. *Froug v. A.H. Robins Co.*, No. 3-80-527 (S.D. Ohio, 1982) (see Exhibit J attached). Robins then unsuccessfully argued that *Froug* should be overruled based on *Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. den.*, 469 U.S. 1123 (1985). *In Re Shary Nunley and Other Plaintiffs v. A.H. Robins Co., Inc.*, No. C 2-80-458 (S.D. Ohio, W.D. Dayton, 1983). (See Exhibit K.)

b. Denying Retroactive *Effect* of *Bendix* Does Not Retard or Thwart its Purpose.[7]

If denial of the "retroactive *effect*" (*American Trucking*, at 209) (Stevens, J., dissenting) of *Bendix* to Petitioners thwarts the purpose of *Bendix*, such a remedy would be impermissible. *Bendix* was decided by this Court almost seven years ago. It is extremely unlikely that anyone other than Carol Hyde and the Ohio Dalkon Shield claimants will benefit from such

[7]The *Chevron Oil* Court did not discuss its analysis of this factor. Apparently, the Court found it satisfied in a statute of limitations case by finding of reasonable reliance and the substantially inequitable result of dismissal.

a remedy. When *Bendix* was decided about seven years ago, Justice Scalia questioned then whether or not "a significant burden" (*Id.*, at 888) was placed on interstate commerce by the Constitutionally infirm Ohio tolling statute. Given that virtually the only litigants today whose right of access to court will benefit from denying the retroactive *effect* of *Bendix* include Carol Hyde and the Ohio Dalkon Shield victims, the burden is infinitesimal and does not thwart the purpose of *Bendix*.

As the New Jersey Supreme Court, and later the Third Circuit Court of Appeals, analyzed:

> [C]ertainly, any inhibiting effect the statute might have on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated whether or not that invalidation is retroactive.

Cohn v. G.D. Searle Co., 784 F.2d 460, 465 (3d Cir. 1986). Out-of-state corporations are no longer the subject of discrimination in Ohio. Honoring the reliance of Carol Hyde does not retard the *Bendix* rule.

c. Substantial Inequitable Results Would Occur if the Remedy Accorded Petitioners is Dismissal of Carol Hyde's Complaint.

The cases are clear that the third element of the *Chevron* test is met in most statute of limitation situations. This Court in *Chevron Oil* observed that

> [i]t would produce the most substantial inequitable results to hold that the respondent slept on his rights at a time when he could not have known the time limitation that the law imposed on him.

Chevron Oil, at 404 U.S. 108.

In the words of the *Chevron Oil* court, "nonretroactive application here simply preserves [Carol Hyde's] right to a day in court." *Chevron Oil*, 404 U.S. at 108.

IV. CONCLUSION

The state court had a duty to determine consistent with due process the remedy to be accorded Petitioners when retroactively applying a decision of this Court to the parties before it.

It was proper for the Court below to consider in its first analysis the equitable reliance factors enunciated in *Chevron Oil*. It was likewise proper in its second analysis to weigh the Ohio constitutional right of access to court against the right to a statute of limitation which is not accorded either Federal or state Constitutional protection.

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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EXHIBIT A

WARREN and YOUNG
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134 West 46th Street P.O. Box 2300
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(216) 997-6175
Fax (216) 992-9114

December 2, 1994

VIA FACSIMILE TRANSMISSION
228-7200

James F. Szaller, Esq.
BROWN & SZALLER CO., L.P.A.
Atrium Office Plaza
668 Euclid Avenue, Suite 214-A
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Szaller:

This is to confirm our recent telephone conversation at which time I indicated to you that Petitioners, Reynoldsville Casket Co., and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case.

Very truly yours,
/s/ William E. Riedel
William E. Riedel

WER:djk

EXHIBIT B

WARREN and YOUNG
Attorneys at Law
134 West 46th Street P.O. Box 2300
Ashtabula, Ohio 44004
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Fax (216) 992-9114

December 7, 1994

VIA FACSIMILE TRANSMISSION
AND REGULAR MAIL
696-3924

Robert A. Marcis, Esq.
SPANGENBERG, SHIBLEY, TRACI,
LANCIONE & LIBER
1500 National City Bank Bldg.
629 Euclid Avenue
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Marcis:

This is to confirm that Petitioners, Reynoldsville Casket Co. and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case.

Very Truly Yours,
/s/ William E. Riedel
William E. Riedel

WER:djk

EXHIBIT C

WARREN and YOUNG
Attorneys at Law
134 West 46th Street P.O. Box 2300
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December 9, 1994

VIA FACSIMILE TRANSMISSION
AND REGULAR MAIL
228-7207

James F. Szaller, Esq.
BROWN & SZALLER CO., L.P.A.
Atrium Office Plaza
668 Euclid Avenue, Suite 214-A
Cleveland, OH 44114

Re: Case No. 94-3
United States Supreme Court
Reynoldsville Casket Co., et al., Petitioners
v. Carol L. Hyde, Respondent

Dear Mr. Szaller:

This is to confirm that Petitioners, Reynoldsville Casket Co. and John M. Blosh, do not consent to your appearance as *amicus curiae* in the captioned case on behalf of the Ohio Academy of Trial Lawyers and the Association of Trial Lawyers of America.

Very truly yours,
s/s William E. Riedel
William E. Riedel

WER:djk

EXHIBIT D

EARDLEY & ZULANDT
Attorneys and Counsellors at Law
114 East Park Street Chardon, Ohio 44024
Telephone (216) 286-6117
Fax (216) 286-6138

December 5, 1994

Mr. James F. Szaller
BROWN & SZALLER CO., L.P.A.
14222 Madison Avenue
Cleveland, Ohio 44107-4510

Re: Carol L. Hyde vs. Reynoldsville Casket Co., et al.
Case No. 92-1682
U.S. Supreme Court Case No. 94-3

Dear Mr. Szaller:

Pursuant to our telephone conversation of today's date, I grant permission for you to file an Amicus Brief in the above styled matter on behalf of Dalkon Shield's victims who are represented by Brown & Szaller and those represented by Spangenber, Shipley, Traci, Lancione and Liber.

I also give permission for you to file an Amicus Brief in the above styled matter on behalf of the Ohio Academy of Trial Lawyers and the Association of Trial Lawyers of America.

Sincerely,

EARDLEY & ZULANDT
/s/ David J. Eardley
David J. Eardley

DJE:vkk

EXHIBIT E

DALKON SHIELD CLAIMANTS TRUST
CLAIMS RESOLUTION FACILITY
POST OFFICE BOX 444
RICHMOND, VIRGINIA 23203
TELEPHONE 1-804-783-8600
FAX 1-804-782-0156

August 9, 1993

Dear Counsel:

I am writing in an effort to clarify some misconceptions about the purpose of the Trust's in-depth review/settlement conference process and to reiterate the Trust's "no negotiation" policy. Although we have stated our policy in writing on numerous occasions, some lawyers think the settlement conference will be a negotiating session.

The purpose of the in-depth review is to provide a claimant with a re-review of her claim. As the first step of the in-depth review, the Trust conducts a full audit of the claimant's medical records. Following this audit, and with the benefit of the additional information it produces, the Trust re-reviews the claim at a more thorough, "in-depth" level. Approximately, 90% of initial early settlement offers remain the same after the in-depth review. Of the 10% that change, about half go down and about half go up. The changes from the initial settlement offers are due to the full audit and closer scrutiny of the claims.

The purpose of the settlement conference is for Trust representatives to explain the strengths and weaknesses of your client's claim based on the medical records. It is not a negotiating session and the Trust's settlment offer cannot be changed through negotiations with the Trust representatives.

Very simply, the Trust's representatives cannot negotiate at settlement conferences.

The Trust's settlement conference representatives are not lawyers and are not trained to answer any legal questions or to comment on legal issues. Indeed, at the time of the settlement conference, no lawyer for the Trust has undertaken any effort to analyze the claim to determine appropriate legal defenses. No Trust lawyers are involved in the evaluation of the claim for purposes of extending an initial settlement offer, conducting the in-depth review and settlement conference, or extending final settlement offers. Counsel for the Trust do not analyze a claim unless or until a claimant rejects her final offer and proceeds to trial or regular arbitration.

The Trust's no-negotiation policy continues after a final offer has been rejected by a claimant or has been withdrawn 90 days after the settlement conference. As the Trust has previously stated, once an offer has been withdrawn and a case has been certified for litigation or arbitration, neither the original offer nor any other amount is available to the claimant. Many claimants mistakenly believe that settlement still is an option after a case has been certified.

Because of the Trust's fiduciary obligation to preserve its assets for all claimants and its commitment to make fair and best and final offers during the claims process, the Trust will not settle a case that is in litigation or arbitration. For the same reasons, the Trust, based on the facts and circumstances of each case and upon the advice of counsel, will assert all available defenses in these cases.

Sincerely,

/s/ Georgene M. Vairo

Georgene M. Vairo, Chairperson
Dalkon Shield Claimants Trust

EXHIBIT F

DALKON SHIELD CLAIMANTS TRUST
Claims Resolution Facility
Post Office Box 444
Richmond, Virginia 23203
Telephone: 1-804-343-4408
FAX: 1-804-782-0156

Michael M. Sheppard
Executive Director

By Certified Mail,
Return Receipt Requested

November 29, 1994

Donna R Harper-Brooks
C/O BROWN & SZALLER CO L P A
14222 MADISON AVENUE
CLEVELAND OH 44107-4510

Claim Number — DS237965

Dear Donna R Harper-Brooks:

If you do not accept your final offer within the 90 day period following your Settlement Conference, the Trust will send you an election form. You must complete this election form and return it to the Trust if you wish to pursue your Dalkon Shield claim through trial, binding arbitration or Alternative Dispute Resolution ("ADR"). The option to accept your final offer will remain available until you complete the election form and it is received by the Trust.

Certification Process

Once the Trust receives a properly completed election form, it will take appropriate steps with the United States District Court for the Eastern District of Virginia ("the Virginia Court") to certify you to go forward to trial, binding arbitration or ADR. The Trust will not be able to ask the Virignia Court to certify you to proceed with trial or binding arbitration unless we have received from you a written settlement proposal. Please note that this settlement proposal will not be used to negotiate your claim but is only a step that is necessary to comply with section E.4 of the Claims Resolution Facility ("CRF").

Once the Virginia Court has entered a certification order, you will be able to file or refile a lawsuit. If you elect binding arbitration or ADR, the Trust will initiate the process in accordance with the arbitration or ADR Rules, as appropriate, immediately upon receipt of the certification order. You may not proceed with litigation, arbitration or ADR until your claim is certified by the Virginia Court.

Considerations for Electing Trial or Arbitration

Before you decide whether to accept your offer or proceed with litigation or arbitration you should consider the following:

- The Trust will withdraw your offer when you elect arbitration or trial.
- The Trust will be your adversary in trial or arbitration and will vigorously defend against your claim.
- During the claims review process, the Trust did not review your claim from a legal standpoint. No lawyers looked at or evaluated your claim to determine its potential weaknesses. Once your case is in trial or arbitration, the Trust will be represented by legal counsel

who will advise it on which defenses to assert, including whether the statute of limitations may be applicable. The CRF permits the Trust to use all available defenses in trial. The Trust also may use all available defenses in binding arbitration, except for absence of product defect.

- Any award that you may receive in litigation or arbitration will be governed by what is referred to as the "holdback." This means if you receive a judgment or award that exceeds both $175,000 *and* your final Option 3 offer amount, you may not receive all of your judgment or award immediately. The Trust will pay $175,000 or the Trust's final settlement offer amount, whichever is greater, and will "hold back" the remainder until satisfied that enough money remains to pay all valid, timely Dalkon Shield Claims. If sufficient funds remain once all valid, timely Dalkon Shield Claims have been paid, the Trust will pay proportionately any unpaid amount from its remaining assets. The holdback allows the Trust to fulfill its obligation to take steps to ensure that everyone with valid, timely claims receives compensation for their injuries. There is no holdback in ADR.

  (Note: The Virignia Court's Amended Administrative Order No. 1, a copy of which is enclosed, refers to an initial minimum payment of $10,000 in a holdback situation. Effective September 15, 1994, the Trustees raised the minimum amount to the greater of $175,000 or the Trust's Option 3 offer.)

- The Trust will not negotiate with you once you have rejected or failed to accept your offer. The Trust will not engage in any settlement negotiations with you or your attorney after your claim proceeds to trial, arbitration or ADR.

In making your decision, it may be helpful for you to know about results where juries or arbitrators have decided recent Dalkon Shield cases after a full hearing of both sides' evidence. This information is shown on the enclosed chart of Jury Trial/Regular Arbitration Hearing Results, and is explained here.

As of November 1, 1994, decisions have been received in twenty-five regular arbitration cases and jury trials against the Trust involving twenty-nine claimants. The Trust's Option 3 offers to these claimants totaled $1,060,804. The claimants had submitted counteroffers demanding a total of $15,655,000 in damages. In thirteen of the cases, the claimants recovered nothing. The juries or the arbitrator found in favor of the Trust in twelve of those cases and the court directed a verdict for the Trust in the thirteenth. One other case resulted in a mistrial. Only eleven plaintiffs have prevailed against the Trust, and they were awarded a total of $1,043,500 in damages.

Considerations for Electing ADR

ADR provides claimants with the opportunity to present their cases to a neutral person and resolve their claims as quickly as possible and with as few legal complications as possible. The maximum amount recoverable in ADR is $20,000. Some of the advantages of ADR include:

- The Trust will not assert a statute of limitations defense in ADR.
- The Trust pays the administrative cost of ADR and the expenses of the independent referee who hears the ADR proceeding.
- The holdback does not apply in ADR.
- There is no formal discovery in ADR.

- ADR offers a quick resolution; the hearing lasts no more than 2-1/2 hours and most ADR hearings are held within 6 months of certification.
- The Trust will not be represented by a lawyer in the ADR hearing.

Information regarding the overall results of ADR hearings is shown on the enclosed chart of ADR Statistics, and is explained here. As of November 1, 1994, approximately 1,400 claims had been resolved through ADR. The Trust offered these claimants a total of $2,098,232 under Option 3. After the ADR hearings on these claims, the referees awarded the claimants a total of $8,030,574 in damages, which is almost four times what the Trust had offered.

Important Enclosures

Obviously, the decision to accept or reject your final settlement offer from the Trust is very important. To help you make your decision, we have enclosed the Amended Adminstrative Order No. 1, which is the Virignia Court's Order governing all litigation or arbitration proceedings. In addition, we have enclosed the CRF, the rules governing regular arbitration, the rules governing ADR, a booklet explaining arbitration, a booklet explaining ADR, a chart giving arbitration and jury trial statistics and a chart giving ADR statistics. Please read all of these materials very carefully before making yor decision.

Finally, if you do not have an attorney and wish to pursue your claim through regular arbitration or trial, the Trust recommends that you seek legal advice.

Sincerely,

Nina M. Gentry
Personal Contact

Enclosures:
Amended Administrative Order No. 1
Claims Resolution Facility
Rules Governing Regular Arbitration
Q & A — Common Questions About Arbitration
Arbitration Glossary
Jury Trial and Regular Arbitration Hearing Results Chart
Second Amended Rules Governing ADR
Q & A — Common Question About ADR
ADR Statistics Chart

EXHIBIT G

1993 SESSION LAWS

Chapter 419

SILICONE BREAST IMPLANTS OR DALKON SHIELD INTRAUTERINE DEVICES — PERSONAL INJURY OR DEATH — STATUTE OF LIMITATIONS — EXTENSION

AN ACT to authorize extension of the statute of limitations for commencing a cause of action for personal injury or death caused by silicone.

Approved and effective July 21, 1993.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1, of Section 1. Every cause of action for personal injury or death caused by the effects of silicone gel injected or implanted within the body, or caused by the effects of a silicone breast implant or its component parts implanted within the body, or caused by the effects of a dalkon shield intrauterine device inserted or implanted within the body, which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired, is hereby revived and an action, thereon may be commenced provided such action is commenced within one year from the effective date of this act or in the case of an action caused by the effects of a dalkon shield intrauterine device an action by a claimant of the Dalkon Shield Claimants Trust may be commenced within one year of certification to proceed with litigation provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which has not been barred as of the date of the decedent's

death and could have been brought pursuant to section 5-4.1 of the estates, powers and trusts law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required. Any action pursuant to this section commenced prior to the effective date of this act shall not be dismissed based upon any period of limitations.

This section shall not be applicable to any action for medical malpractice.

§2 — § 2. This act shall take effect immediately.

EXHIBIT H

SENATE BILL No. 607

AN ACT concerning civil procedure and civil actions; relating to limitation of civil actions related to Dalkon Shield victims.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Except as provided in subsection (c), notwithstanding any other limitation contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action, except an action for relief on the ground of fraud, brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall be brought in accordance with procedures established by the A.H. Robins company, inc. plan of reorganization, and shall be brought within 10 years of the time in which such cause of action shall have accrued.

(b) Any civil action for relief on the ground of fraud brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall not be deemed to have accrued until the fraud of A.H. Robins company, inc. was discovered, without regard to the date any physical injury occurred.

(c) The provisions of this act shall not affect any applicable statute of repose as otherwise provided by law.

(d) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

EXHIBIT I

CALIFORNIA LEGISLATURE – 1993-94 REGULAR SESSION

ASSEMBLY BILL NO. 2855

Introduced by Assembly Members Archie-Hudson, Bronshvag, Barbara Friedman, Terry Friedman, Lee, Martinez, Moore, O'Connell, and Speier
(Coauthors: Senators Killea, McCorquodale, Torres, and Watson)

February 17, 1994

An act to add Section 340.7 to the Code of Civil Procedure, relating to limitation of actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 2855, as introduced, Archie-Hudson. Limitation of actions.

Existing law sets the statute of limitations applicable to actions of injury or death caused by the wrongful act or neglect of another at one year.

This bill would enact an exception thereto with respect to certain actions against the Dalkon Shield Claimants' Trust, as specified, extending the statute of limitation to 15 years, tolling such actions as specified, and providing that these provisions apply to actions which have lapsed.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 340.7 is added to the Code of Civil Procedure, to read:

340.7. Notwithstanding subdivision (3) of Section 340, any civil action brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield Claimants' Trust, shall be brought in accordance with the procedures established by A.H. Robins Company, Inc. Plan of Reorganization, and shall be brought within 15 years of the date on which the victim's injury occured, except that the statute shall be tolled from August 21, 1985, the date on which the A.H. Robins Company filed for Chapter 11 Reorganization in Richmond, Virginia.

This section applies regardless of when any such action or claim shall have accrued or been filed and regardless of whether it might have lapsed otherwise be barred by time under California law.

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-3-80-527

PHYLLIS FROUG, et al.;

Plaintiffs

v.

A.H. ROBINS COMPANY,

Defendant

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendant's Motion for Summary Judgment. Defendant claims that plaintiffs' action is barred by the applicable statute of limitations. Furthermore, defendant asserts that the so-called "savings clause" of Ohio Rev. Code §2305.15, which tolls the statute of limitations in certain instances, is unconstitutional as violative of the Commerce Clause[1] of the United States Constitution. For the reasons discussed below, defendant's Motion is DENIED.

This case concerns an allegedly defective intrauterine device known as a "Dalkon Shield" which was manufactured by defendant, A.H. Robins Company. Plaintiff, Mrs. Froug, contends that she developed pelvic inflammatory disease after

[1]A similar New Jersey statute has recently withstood Equal Protection attack. *See, G.D. Searle & Co. v. Cohn*, __U.S.__ (1982), slip op. Defendant no longer challenges §2305.15 under the Equal Protection Clause.

the I.U.D. was inserted in July of 1971 and that the disease progressed even after it was removed in December of 1972. Mrs. Froug alleges that the defective design of the Dalkon Shield was the proximate cause of the disease which eventually necessitated a total hysterectomy in 1975.

Plaintiffs filed this suit on December 5, 1980. Defendant has raised the statute of limitations, Ohio Rev. Code §§2305.09 and 2305.10, as defenses. Section 2305.10 is a two-year statute of limitations that applies to actions for personal injury; this section applies to Mrs. Froug's claim for relief. Plaintiff's husband has sued for loss of consortium and for medical and hospital expenses; his claim is governed by Ohio Rev. Code §2305.09, which is a four-year statute of limitations.

Initially, the Court notes that the parties dispute the fact whether Ohio law recognizes a "manifestation" or a "discovery" rule regarding the statute of limitations. According to the manifestation rule, a cause of action accrues, and the statute begins to run, when the injuries manifest themselves. The limitation periods would have expired under the manifestation rule. Even if the Court concluded that the injuries manifested themselves on August 18, 1975, when the hysterectomy was performed, the four-year period of §2305.09 and the two-year period of §2305.10 would have run before this suit was filed in 1980. However, according to the discovery rule, the statute of limitations is tolled until the plaintiff gains actual knowledge of the causal connection between her injuries and the act(s) of defendant. Here, Mrs. Froug became aware of her injuries and the alleged cause thereof, the Dalkon Shield, on May 18, 1980, when her gynecologist mailed to her attorney an abstract of office records mentioning the name "Dalkon Shield." Under the discovery rule, the running of the statutes would have been tolled until May of 1980; this action would have been filed well within either the two or four-year periods.

The Court need not, however, resolve the issue of which rule Ohio law favors because both statutes of limitations were tolled by the "savings clause" of ORC §2305.15.

Section 2305.15 provides, in pertinent part, that:

> "When a cause of action accrues against a person if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action. . . . does not begin to run until he comes into the state or while he is so absconded or concealed."

There is no doubt that this statute applies to defendant, a corporation that is neither incorporated under the laws of Ohio nor qualified to do business in the state. A foreign corporation on which personal service cannot be had in Ohio is "out of state" for purposes of the tolling provisions of the savings statute; the limtiations period does not begin to run until the corporation is subject to personal service notwithstanding the fact that *in personam* jurisdiction might be available by substituted service. *Ohio Brass Co. v. Allied Products Corp.*, 339 F.Supp. 417, 424 (N.D. Ohio 1972).

Defendant challenges the constitutionality of §2305.15 under the Commerce clause. However, the Ohio statute does not offend the Constitution according to either of the two tests set forth by the Supreme Court. Congress has been granted the power to regulate commerce among the states. However, many subjects of potential Congressional control go unregulated because of their local peculiarity, their number and their diversity. *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185. These subjects are therefore open to state and local control, so long as the regulations established do not go beyond the limits of the Commerce Clause. *Raymond Motor Transportation, Inc., v. Rice*, 434 U.S.

429, 440. Concerning the boundaries of the Commerce Clause, the Supreme Court has said that "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). Where simple economic protectionism is the goal of state legislation, a virtually *per se* of invalidity applies. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, a much more flexible approach is used where there is no patent discrimination against interstate commerce:

> "Where the statue regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Arguing that the *per se* rule of invalidity applies, defendant cites to *Sioux Remedy Company v. Cope*, 235 U.S. 197 (1914). Defendant's reliance on the *Sioux Remedy* case is misplaced. In that case, an Iowa corporation was not permitted to collect the purchase price for goods sold and delivered to a South Dakota buyer. South Dakota had a statute prohibiting an out-of-state corporation from transacting business within the state unless the corporation registered with the Secretary of State and paid a filing fee. Furthermore, the corporation could not bring suit in a South Dakota court unless it appointed a resident agent for service of process, which would mean subjecting itself to the jurisdiction of all South Dakota state courts. The Supreme Court ruled that these statutes prohibiting a foreign corporation from transacting business in state or from

suing in state court violated the Commerce Clause because they were particularly burdensome to the enforcement of contractual rights. 235 U.S. at 205. Ohio "Savings Statute" does not affect a foreign corporation as drastically as the South Dakota statute. Section 2305.15 does not prevent an unregistered foreign corporation from transacting business within the state. Nor does it prevent that corporation from suing in a state court. Rather, §2305.15 operates to insure that a foreign defendant has an authorized agent in the state to accept service of process so that jurisdiction over the defendant may be had in as quick and expeditious a manner as possible. Thus it is apparent that the purpose of the savings statute is *not* economic protectionism. The *per se* rule of invalidity does not apply.

Defendant argues in the alternative that §2305.15 nevertheless is invalid according to the standards enunciated in the *Pike* case. *Pike* holds that where a statute regulates evenhandedly to effectuate a legitimate local public interest, it will be upheld unless its effect on interstate commerce is clearly excessive to the local benefit. *Pike v. Bruce Church, Inc., supra.*

The Court notes at the outset that the savings statute does operate evenhandedly. There is no patent discrimination against foreign defendants. Section 2305.15 applies whether the defendant is foreign or is an Ohio resident who conceals himself or absconds from the state. Ohio Rev. Code §2305.15; *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 64-65 (1971), *Meekison v. Groschner*, 153 Ohio St. 301, 308 (1950) (concerning G.C. 11228, the predecessor statute to §2305.15). Nor does the savings statute differentiate between corporate and individual defendants. The word "person" in that section applies equally to corporations and natural persons. *Moss v. Standard Drug Co.*, 94 Ohio App. 269, 274 (1952).

Besides operating evenhandedly a statute must efffectuate a legitimate local interest in order to withstand consitituional scrutiny under the Commerce Clause. Curiously, the cases are devoid of any indication of the legislative intent behind §2305.15. This Court, therefore, makes a rational inference as to the purpose of the savings statute. That purpose falls within the broad ambit of the State's police powers. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). The legislature, by enacting §2305.15, has intended to protect Ohio citizens from any harm that may befall them from persons who are either absent from the state or from residents who subsequently depart from the state. The rights of Ohio citizens[2] are preserved by tolling the statute of limitations until such time as the defendant enters or re-enters the state. Even though an out-of-state defendant may be subject to *in personam* jurisdiction by virtue of substituted service of process under Ohio Rule of Civil Procedure 4.3(B)(1), any act by an out-of-state defendant that prevents personal service nevertheless tolls the statute of limitations. *Mead Corporation v. Allendale Mutual Insurance Co.*, 465 F.Supp. 355, 361 (1979 N.D.Ohio); *Ohio Brass Co. v. Allied Products Corp.*, 339 F.Supp. 417, 424 (1972 N.D. Ohio). This is so despite the availability of long arm jurisdiction (under Ohio Rev. Code §2307.38.2) because a foreign defendant may be difficult to locate and serve. *G.D. Searle & Co. v. Cohn*, __U.S.__ (1982), slip op. at 6. Even though, in this case the defendant is a large corporation and easily located, does not render invalid the underlying assumption that many unrepresented foreign corporations are difficult to locate. *Id.*

[2]Note that non-resident plaintiffs are similarly protected regarding causes of action that accrue in Ohio. *See, Seeley v. Expert, Inc.*, 26 Ohio St.2d 61 (1971).

Having established that a legitimate local purpose exists, the Court must now determine whether the statute's effect on interstate commerce is clearly excessive in relation to the putative local benefits. Defendant contends that it is denied the benefit of the statute of limitations, unless it subjects itself to personal service in Ohio. Undoubtedly, this is a slight burden on interstate trade. However, Robins is not denied the possibility of prevailing in this action. Plaintiffs must still plead and prove all aspects of their case. Besides the statute of limitations is but an act of legislative grace; its shelter is not regarded as a "fundamental right." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Unlike the situation in *Sioux Remedy*, defendant Robins is not totally prevented from transacting business in the state. Nor is Robins precluded from suing in state courts to recover on otherwise valid contracts. Robins has and continues to do business in Ohio and reaps profits thereby.

Defendant argues that §2305.15 is an undue burden on interstate commerce because if defendant were to appoint a resident agent for service of process, its amenability to suit in Ohio courts would be greatly expanded. Robins argues that it would be unfair to subject itself to a potential multiplicity of actions because in many cases, it lacks the necessary "minimum contacts" with Ohio to establish personal jurisdiction. Defendant correctly points out that the decisive factor to be considered is "the relationship among the defendant [Robins], the forum [Ohio] and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1980). Curiously, Robins suggests that a less restrictive alternative to §2305.15 exists, namely, that jurisdiction may be invoked under Ohio's longarm statute, Ohio Rev. Code §2307.38.2, and process served by certified mail. Defendant thus admits, at least by implication, that the necessary minimum contacts do exist to tie it to the

state of Ohio. Ohio longarm jurisdiction may be exercised when, but not exclusively, the defendant: (1) transacts any business in Ohio; (2) contracts to supply services or goods in Ohio; (3) causes tortious injury in Ohio; or (4) breaches an express or implied warranty. Ohio Rev. Code §2307.38.2(A)(1-5).

Because Robins transacts business within Ohio, the necessary minimum contacts are present to establish long-arm jurisdiction. Substituted service of process by certified mail would ordinarily be available. However, because defendant is "out-of-state", the savings statute comes into play. The statutes of limitations are tolled until such time as defendant enters the state. There is no doubt that Robins is amenable to certified mail services. Defendant is a large, nationally-known corporation, whose whereabouts are easily identified. But the purpose of the savings statute is to lessen the plaintiff's burden in gaining personal jurisdiction over the defendant. Not all defendants are large corporations. Many defendants are hard to locate and/or travel from state to state, making certified mail service a difficult enterprise. Section 2305.15 is phrased in mandatory language. There are no exceptions for defendants whose actual location is known to the plaintiff. The savings clause simply preserves a plaintiff's cause of action by tolling the statute of limitations until such time as the plaintiff may personally serve the defendant.

For the reasons discussed herein, defendant's Motion for Summary Judgment is hereby DENIED.

/s/ Carl B. Rubin

Carl B. Rubin,
Chief Judge
United States District Court

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-2-80-458

IN RE SHARY NUNLEY
AND OTHER PLAINTIFFS, et al
vs.
A. H. ROBINS COMPANY, INC.

MEMORANDUM AND ORDER
Consolidation and Bifurcation

1. *Background of the Litigation*

The Dalkon Shield is an intrauterine contraceptive device. It was invented and improved over a number of years by Hugh J. Davis, M.D. and Irwin S. Lerner. In November 1968, Mr. Lerner applied for a patent on the design of the Dalkon Shield. Two months later, he and Dr. Davis formed the Dalkon Corporation. The device was clinically tested by Dr. Davis at Johns Hopkins University, School of Medicine, from September 1968 to November 1969. At that time, it was commercially introduced to the medical profession by the Dalkon Corporation. On June 12, 1970, the A.H. Robins Co., Inc. (Robins), a manufacturer and distributor of pharmaceutical products, purchased all rights to the Dalkon Shield from Mr. Lerner and the Dalkon Corporation.

Robins initiated its national promotion and marketing of the Dalkon Shield in January 1971. Between the date Robins acquired the device from the Dalkon Corporation and June

28, 1974, when Robins voluntarily suspended distribution of the Dalkon Shield, approximately 2.2 million Dalkon Shields were prescribed to and inserted in women in the United States.

Dalkon Shield is a medically prescribed pharmaceutical product. It could be inserted and fitted by a physician. Each Dalkon Shield package contained labeling instructions and materials describing how the device was to be inserted, contraindication to its use and potential side effects. The fitting physician was to explain to the prospective wearer about the advantages and disadvantages of using the Dalkon Shield as a means of contraceptive method. If the decision was made to have the Dalkon Shield inserted, the physician was to perform certain preliminary fitting procedures outlined in the labeling instructions.

During the years in which the Dalkon Shield was sold, a number of women who had been fitted with the intrauterine device allegedly suffered adverse reactions and serious bodily injuries. Many of these women brought suits in federal courts against Robins. Their complaints alleged a number of legal theories for their recoveries, including negligence, gross negligence, strict liability in tort, failure to give adequate warnings, breach of warranties, misrepresentations, conspiracy and fraud. Additional defendants in some of these actions included plaintiffs' personal physicians, hospitals and clinic, and two physicians who served as medical consultants to Robins and who at one time held proprietary interests in the Dalkon Shield.[1] Because many of these actions involved common questions of facts, the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 transferred actions in this litigation to the District of Kansas and assigned to The Honorable Frank G. Theis for coordinated and consolidated pretrial discovery

[1]Counsel has now advised the Court that Robins is the only defendant in these cases at bar.

proceedings. *In re A. H. Robins Co., Inc. "Dalkon Shield' IUD Products Liability Litigation,* Docket MDL 211, 505 F.Supp. 221 (J.P.M.L., 1981); 453 F.Supp. 108 (J.P.M.L., 1978); 419 F.Supp. 710 (J.P.M.L., 1976); 406 F.Supp. 540 (J.P.M.L., 1975).

II. *Dalkon Shield cases in the Southern District of Ohio*

On April 1, 1983, we received an assignment of the Dalkon Shield I.U.D. cases for the Southern District of Ohio. Of these 136 cases, 126 were filed in Columbus, 3 in Cincinnati, and 7 in Dayton. The total number of cases was increased to 153 when 17 more were added to the list at a later time. As of this time, November 30, 1983, there are 103 cases calendared — some 50 or so cases have been disposed of by dismissal or settlement.

Between May 20, 1983 and July 26, 1983, this Court held several conferences in Dayton, Ohio with the attorneys involved in these cases. To expedite the disposition of the Dalkon Shield cases, the Court issued a General Order outlining the pretrial and trial procedures. In this Order, and by agreement of the parties, the Court specifically mandated that the pretrial orders issued by Judge Frank G. Theis in the MDL 211, including the various rulings in the discovery proceedings, would apply to these cases presently pending in the Southern District of Ohio.

The Court has had occasion to call the attention of the parties to the time problems involved in trial of these cases. Counsel has advised that each case would require a minimum of six weeks or at least 30 trial days. The Court has noted that a 30-day trial could and would cause difficulty for a judge in the district with a full calendar or for a visiting judge. Nevertheless, the Court, by consent of counsel, scheduled cases in the following manner.

The court originally designated 15 cases (Group I) for trial on November 7, 1983. These cases were assigned strictly by reference to the oldest chronological dates of filing of all Dalkon Shield cases before the Court. The Court was advised that plaintiffs in these first 15 cases are represented by five different counsel including Mr. James Szaller and Mr. Phillip Zauderer, who represent seven plaintiffs in the first 15 cases. Mr. Zauderer also represents the plaintiffs in all but five or six of the remaining Dalkon Shield cases before this Court.

On July 26, 1983, we ordered counsel to prepare and circulate preliminary pretrial orders setting forth the discovery schedules and legal claims of each plaintiff in these first 15 cases. Counsel duly complied; and the Court approved these preliminary pretrial orders on August 22, 1983. The Court also ordered 30 back-up cases (Group II) to be ready for trial on November 7, 1983, in addition to the first 15 cases. Final Pre-trial Conferences were set on November 1, 1983 on any of these cases not settled or otherwise disposed by that time.

On August 26, 1983 and various occasions thereafter, Robins moved for summary judgment in a number of cases from Group I and II. Robins argued in these motions that plaintiffs' actions for personal injuries were barred by the applicable statute of limitations. Robins further asserted, in light of the recent New Jersey Supreme Court case, *Coons v. American Honda Motor Co., Inc.*, 463 A.2d 921 (N.J. 1983), that the application of the Ohio "savings clause," Ohio Rev. Code §2305.15, to it — a foreign corporation — violated the Commerce Clause of the U.S. Constitution.

We note Robins had previously raised these two issues in *Froug v. A. H. Robins Co., Inc.*, No. 82-527 (S.D. Ohio 1982), a companion case which was set for trial before the Court on November 7, 1983. In overruling Robins' motion for summary judgment, Judge Rubin in *Froug* found under the Ohio

law, as the Ohio State Supreme Court has consistently construed it, the "savings clause" tolling of the statute of limitations in personal injury cases is tied to a defendant's amenability to personal serivce. *See Seely v. Expert, Inc.*, 26 Ohio St.2d 61, 65-66 (1971). If a defendant is not amenable to personal service within the State of Ohio, that defendant is deemed to be "out of state" within the meaning of Section 2305.15 and the applicable statute of limitations is tolled from running in his favor. This rule applies even when the defendant is a non-resident of Ohio, and despite the fact that the substituted service is available under the Ohio long-arm statute. Judge Rubin concluded this tolling statute applies to Robins because Robins has never been incorporated under the laws of Ohio or registered to do business in that state.

Judge Rubin also rejected Robins' alternative argument to invalidate the "savings clause" as violative of the Commerce Clause of the U.S. Constitution. Judge Rubin found the "savings clause" did not impermissibly offend the Commerce Clause under the tests stated in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pike v. Bruce Church, Inc.*, 297 U.S. 137 (1970); and *Sioux Remedy Company v. Cope*, 235 U.S. 197 (1914).

On October 6, 1983 we heard arguments from the respective parties concerning the issues raised by Robins in its motin for summary judgments in a number of cases from Group I and II. Robins focused its contention on the constitutionality of the savings clause, urging this Court to overrule Judge Rubin's decision in *Froug, supra*, in light of a recent New Jersey Supreme Court case, *Coons v. American Honda Motor Co., Inc.*, 463 A.2d 921 (1983). Robins argued this Court should follow the New Jersey court's decision, since it construed a New Jersey tolling statute similar to the Ohio savings clause.

Initially, it is observed that the *Coons* decision came from a divided court. Three justices of a seven-member panel dissented, questioning whether the majority has properly construed the tolling statute as violative of the Commerce Clause. The majority in *Coons* held the New Jersey tolling statute impermissibly placed an unconstitutional burden on interstate commerce when it required a foreign corporation to formally register to do business in New Jersey before it could appoint a resident agent to receive service of process and to get the benefits of the tolling statute. 463 A.2d 921, 926.

We find Robins' reliance on the *Coons* decision is misplaced, to the extent of that court's Commerce Clause holding. The Ohio tolling statute, in substance, is not the same as the New Jersey tolling statute. The Ohio tolling statute does not contain a provision which requires a foreign corporation to procure a certification of authority by registering to do business before it can appoint a resident agent for service of process in order to enjoy the benefits of the tolling statute. All the statute says is that if a defendant is not amenable to personal service within the State of Ohio, that defendant is deemed to be "out of state" within the meaning of the tolling statute and the applicable statute of limitations is tolled from running in his favor. *Seely v. Expert Inc.*, 26 Ohio St.2d at 65-66; *Vostack v. Axt*, 510 F.Supp. 217, 223 (S.D. Ohio 1981); *Mead Corporation v. Allendale Mutual Insurance Co.*, 456 F.Supp. 355, 361 (N.D. Ohio 1979); *Ohio Brass Co. v. Allied Products Corp .*, 339 F.Supp. 417, 424 (N.D. Ohio 1972). Whatever alleged hardship is created by this savings clause on foreign corporation, as plaintiff's counsel pointed out in the oral argument, can be eliminated by designation of a resident agent in Ohio for service of process. *Cf. G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Unlike New Jewsey, there is nothing in Ohio law to prevent Robins from doing that.

After having heard oral agruments from the parties on October 6, 1983, the Court announced from the bench its deci-

sion to overrule Robins' motion for summary judgment in these cases at bar. We adhere to that ruling and holding in *Froug, supra*. Our decision on the constitutionality of the tolling statute is, of course, subject to reconsideration if reasserted by any parties at the conclusion of any trial in which the statute may be applicable. Dkt. 113m.

At the October hearing, the parties were directed to have ready on or before November 1, 1983, at the Final Pre-trial Conference the following:

1) a list of their witnesses,
2) a summary of the testimony of such witnesses,
3) a list of all exhibits marked by and filed with the Clerk's Office,
4) written exceptions or objections to the testimony or exhibits with specific reference to the Federal Rules of Evidence to support each objection, and
5) any substantive motion with briefs for the Court to rule upon by November 1, 1983.

III. *Consolidation and Bifurcation, FRCP 42(a) & (b)*

On November 1, 1983, the Court held Pre-trial Conferences on 9 cases designated for trial on November 7, 1983.[2]

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[2]Phyllis Froug, No. C-3-80-527; Vicki Thompson, No. C-2-81-1489; Edith Binford, No. C-2-82-422; Anna Cassidy, No. C-2-82-379; Kathleen Flowers, No. C-3-83-080; Sharon Hemmerly, No. C-2-82-386; Rosalie Nunley, No. C-2-82-380; Martha Smith, No. C-2-82-389; Pauline Swinford, No. C-2-82-476.

Counsel estimated that it would take at least 30 trial days to complete trying a case if these cases were to be tried individually. This would take 270 trial days — and there would be over 100 cases left. It requires no clairvoyant power to conclude that any attempts to try these 100 or so cases *in seriatim* would bankrupt the already congested district court's calendar and result in a tedium of repetition lasting well into the next century.

The parties had prepared Proposed Pre-trial Orders to present to the court for approval and had filed numerous motions in limine for the Court to rule upon prior to trial scheduled for November 7, 1983. The Court noted that while counsel had been industrious in seeking to have a Pre-trial Order acceptable to the Court, it was, however, not satisfied. The Court found the summary testimony of the witnesses was not adequate. The objections to witnesses and exhibits would require additional rulings by the court. While the Court had indicated that it would, if time and other assignments permitted, try the cases in the order filed, the Court felt it would be inappropriate for it to commence the trial of the 9 cases on November 7, 1983.

At the same time, the Court announced its intention to invoke Rule 42(a) of the Federal Rules of Civil Procedure and to consolidate *all* Dalkon Shield cases presently pending before this Court. Additionally, the Court planned to bifurcate, under the authority granted by Rule 42(b) of the Federal Rules of Civil Procedure, these consolidated actions and to hold a "generic liability" trial. Counsel were advised to have the remaining cases ready for preliminary pretrial or pretrial proceedings in accordance with the Court's General Order.

The plaintiffs in these cases assert numerous theories of recovery, the Court observes from the complaints, the Preliminary Pre-trial Orders and the Proposed Final Pre-trial Orders, the theories of recovery do not significantly vary from case to case. The theories include negligence, gross negligence, strict liability in tort, breach of implied and express warranties, failure to give adequate warnings, misrepresentation, conspiracy and fraud. The Court is of the opinion that these theories may be segregated into two broad categories; product liability and misrepresentation.

The theories of negligence, gross negligence, strict liability in tort, and implied warranty all fall within the broad category of products liability. Misrepresentation, conspiracy, fraud and breach of express warranty all come within the category of misrepresentation. Additionally, the adequacy of the defendant Robins' warnings raise questions related to both categories.

Because the theories are essentially the same, the Court envisions that the resolution of these cases can be greatly simplified and expedited in two ways. First, the extent to which the theories are repetitive, only some theories need to be tried. Second, these cases can be consolidated and bifurcated for trial on issues relating to liabiity under each category. *See*, Rule 42 of the Federal Rules of Civil Procedure.

First, the category of products liability contains repetitive theories. In Ohio, there is virtually no distinction between strict liability under § 402A of the Restatement (Second) of Torts and breach of implied warranty. ***Temple v. Wean United, Inc.***, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977). The key issue under either of these theories is whether the product is in a defective condition. Three recent Ohio Supreme Court decisions have developed how this issue is resolved. ***Leichtamer v. American Motors Corp.***, 67 Ohio St.2d 456, 424 N.E.2d 568 (1981); ***Knitz v. Minster Machine Co.***, 69 Ohio St. 2d 460, 432 N.E.2d (1982); ***Cremeans v. International Harvester Co.***, 6 Ohio St.3d 232 (1983). Similarly the question of whether defendant was negligent or grossly negligent is dependent on a defect in the product. Also, whether defendant gave adequate warnings, in part, is related to existence of a defect in the product. As the court said in ***Knitz v. Minster Machine Co., supra:***

> Appellant also offers the proposition that the failure to give adequate warnings gives rise to a cause of action in strict liability. As we pointed out in *Temple*, 50 Ohio St.2d at page 325, 364 N.E.2d 267, '[i]t is . . . apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort result from the failure to meet this duty is, in essence, a negligent act. . .
>
> Moreover, we held in *Leichtamer*, 67 Ohio St.2d at page 469, 424 N.E.2d 568, that '[t]he absence of a warning does not, without more, provide a basis for [strict] liability; rather, evidence of warning is in the nature of an affirmative defense to a claim that a product is unreasonably dangerous.'

432 N.E.2d at 818 fn. 5. *See also*, Restatement (Second) of Torts, § 402A, Comment J, k. *See also, Seley v. G.D. Searle & Co.* 67 Ohio St.2d 192, 423 N.E.2d 831 (1981).

From the foregoing, the Court concludes that all theories within this first category have the same central issue: namely, was there a defect in the Dalkon Shield? Even though this issue is resolved a bit differently under some theories, i.e., there are differing standards of care, each will depend on the same evidence.[3]

Similarly within the second broad catregory, there are questions common to each theory. Misrepresentation, conspiracy, fraud and breach of express warranty[4] all require determinations of what representations the defendant made, and whether

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[3]*See, In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983).

[4]Ohio recognizes a common law breach of express warranty. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St.2d 244, 147 N.E.2d 612.

any of those representations were false and misleading. Also, the issue of adequacy of warnings is dependent on what representations were made by the defendant. *See, Seley v. G.D. Searle & Co., supra;* Restatement (Second) of Torts § 402A, Comment K.

In addition to the theories of liability, two other issues, common to all these cases, can be resolved in this "generic liability" trial. First, all plaintiffs in these cases allege that a Dalkon Shield caused each plaintiff to suffer pelvic inflammatory disease (PID). In each of these cases, a jury must decide whether a Dalkon Shield can cause PID. It is apparent that the evidence offered on this issue will be the same for each of these cases. Therefore, this question can be resolved in the "generic liability" trial. Later in the individual trials, whether the Dalkon Shield was indeed the proximate cause of each alleged injury may be determined.

Second, whether punitive damages are to be awarded, and if so, what is the proper amount can be decided in the "generic liability" trial. Punitive damages are dependent upon the defendant's behavior. The focus of the "generic liability" trial will be Robins' behavior. The jury in that trial will have all the evidence necessary to decide whether or not to award punitive damages and if so how much, before it. By considering punitive damages only in the "generic liability" trial, the Court can limit, in these cases, the potential excessive awards of punitive damages, which Robins addressed in its trial brief and the court in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) discussed at length.

As stated above, the Court is convinced that resolution of these cases can be simplified and expedited by consolidating and bifurcating these cases for trial on the following issues: 1) Are Dalkon Shields in a defective condition; 2) Did Robins give warnings that were adequate; 3) What representations

did Robins make; 4) Were any of these representations false or misleading; 5) Do Dalkon Shield cause PID; and 6) Are the plaintiffs entitled to punitive damages and, if so, to what amount.

In the Court's opinion, these issues focus solely on Robins' behavior. What any plaintiff did, or the injuries suffered by the various plaintiffs would not be relevant to these issues. Later, if necessary, each case would have its own trial where questions such as individual proximate cause, reliance, damages, and affirmative defenses could be decided.

That this is the only reasonable way to proceed in these cases is reinforced by the witness lists which the parties attached to their Proposed Final Pretrial Statements. Robins, for instance, lists the same witnesses for each case. Also, the different groups of plaintiffs intend to use many of the same witnesses. Thus, the Court anticipates that the evidence will not significantly vary from case to case.

Additionally, this method will diminish some of the concerns raised by Robins in its motion for limine. For instance, should the jury in the "generic liability" trial decide that certain representations made by Robins were false, this fact would not be admitted into the individual trials until there was evidence that the particular plaintiff relied on the representation.

For this to work, the Court will rquire the cooperation and assistance of all counsel. Specifically, the Court will need counsel to draft jury interrogatories relating to the issues which, as outlined above, will be decided in the "generic liability" trial. These will serve as the basis of stipulation to be read to the juries in the individual trials.

IV. *Conclusion*

The Court stated at the last conferences that it would issue a written summation of its intentions so that counsel could file

written responses to it. The Court further stated that, if necessary, it would schedule a hearing to meet with counsel of record with the view to discuss matters concerning this Memorandum and Order to implement the Court's intentions to consolidate and bifurcate this litigation. The Court once again reminds all counsel that just as they will devote their energy and ability to trying to dissuade the Court from proceeding in this manner, they invest the same effort and skill to insuring that this method is as successful as possible.

Accordingly, IT IS ORDERED that all Dalkon Shield I.U.D. caes (sic) filed in the Southern District of Ohio are consolidated under Rule 42(a) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that this consolidated action is bifurcated under Rule 42(b) of the Federal Rules of Civil Procedure and the Court will hold a "generic liability" trial on the following issues:

1) Are the Dalkon Shields in a defective condition;
2) Did Robins give adequate warnings;
3) What representations did Robins make;
4) Were any of these representations false or misleading;
5) Does the Dalkon Shield cause pelvic inflammatory disease; and
6) Are the plaintiffs entitled to punitive damages and, if so, to what amount.

Counsel are requested to have available for review proposed jury instructions and interrogatories to implement the determination of the issues as outlined above for the "generic liability" trial proceedings.

In addition, the Court will review proposed Preliminary Pretrial Orders and Pre-trial Orders with a view to adopting them to the Court's General Order and the Order contained above.

IT IS FURTHER ORDERED that a hearing in said consolidated cases be, and hereby is set before the undersigned Judge for Wednesday, December 21, 1983, at 9:30 a.m. at Dayton, Ohio.

This Order shall apply to all Dalkon Shield I.U.D. cases pending in the Southern District of Ohio.

Dated this 1st day of December, 1983.

/s/ Wesley E. Brown
United States District Senior Judge,
Assigned